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No. 73-1667

# In the Supreme Court of the United States

OCTOBER TERM, 1973

FEDERAL POWER COMMISSION, PETITIONER

*v.*

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT**

---

The Solicitor General, on behalf of the Federal Power Commission, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

### OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 1a–75a) is reported at 489 F. 2d 1207. The principal order of the Federal Power Commission (App. D, *infra*, pp. 78a–80a) and its order denying rehearing (App. E, *infra*, p. 81a) are reported at 46 FPC 1126 and 46 FPC 1307, respectively.

### JURISDICTION

The judgment of the court of appeals (App. B, *infra*, p. 76a) was entered on November 9, 1973. A

timely petition for rehearing was denied on December 7, 1973 (App. C, *infra*, p. 77a). On February 28, 1974, and March 28, 1974, the Chief Justice granted extensions of time within which to file a petition for a writ of certiorari to and including May 6, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power Act, as added, 49 Stat. 860, as amended, 16 U.S.C. 825*l*(b).

**QUESTION PRESENTED**

Whether, under Section 4(e) of the Federal Power Act, as amended, 16 U.S.C. 797(e), the Federal Power Commission has licensing jurisdiction over thermal-electric generating plants that use "surplus water * * * from any Government dam."

**STATUTE INVOLVED**

Section 4 of the Federal Power Act, 41 Stat. 1065, as amended, 16 U.S.C. 797, provides in part:

> The Commission is hereby authorized and empowered—
>
> * * * * *
>
> (e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from or in any of the streams or other

bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservation. *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further*, That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be

issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

**STATEMENT**

The court of appeals held, contrary to the Federal Power Commission's consistent interpretation of the Federal Power Act during the 54 years since its enactment, that the Commission has jurisdiction to license the use by thermal-electric generating plants of "surplus water * * * from any Government dam" (16 U.S.C. 797(e)). The Commission has always taken the position that its licensing jurisdiction under the Act applies only to hydroelectric generating plants.[1]

1. The case arose on a complaint filed with the Commission by two Indian tribes, five individual Indians, and two environmental groups, seeking to enjoin the development and construction of six fossil-fueled steam plants located on the Colorado River System in

[1] Hydroelectric plants use the energy of falling water to generate electric power. Thermal-electric or steam plants generate electricity through the use of steam energy, produced by heat from burning fossil fuels or from nuclear energy. Thermal-electric plants use substantial quantities of water to cool and condense the steam after it has passed through the turbines.

the Four Corners area of New Mexico, Arizona, Utah, and Colorado. The complaint asserted that the Commission has licensing jurisdiction over the plants under Section 4(e) of the Federal Power Act, as amended, 16 U.S.C. 797(e), and that construction should be halted until licenses are issued.

Section 4(e) empowers the Commission to issue licenses to citizens, corporations, and state and municipal agencies

> for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient * * * for the development, transmission, and utilization of power across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam * * *.

Section 23(b) of the Act, as amended, 16 U.S.C. 817, makes it unlawful, "for the purpose of developing electric power, to construct, operate, or maintain any dam * * * or other works * * * along * * * any of the navigable waters of the United States, or upon any part of the public lands * * *, or utilize the surplus water or water power from any Government dam, except under * * * a license granted pursuant to this Act."

The complainants alleged that the Commission has jurisdiction over the thermal-electric plants in this case both because they are "project works" for the development and transmission of power across and along navigable waters and because they will use "surplus water" from government dams. The Commission dismissed the complaint on the ground that it has no jurisdiction to license steam plants (App. D, *infra*, pp. 78a–80a).

2. The court of appeals sustained the Commission's determination in part. It held that thermal-electric plants are not "project works" under Section 4(e) and that the Commission therefore has no licensing jurisdiction over the plants under that clause (App. A, *infra*, pp. 16a–60a). The court traced in detail the legislative history of the Act and the consistent administrative and judicial interpretation since enactment in 1920. It concluded that the Commission's licensing jurisdiction extends only to hydroelectric generating plants and that "[s]team plants were purposely omitted from the congressional scheme" (*id.* at 53a).

The court also held, however, that the Commission's licensing authority under the "surplus water" clause is *not* limited to plants using such water to generate hydroelectric power but includes steam plants using "surplus water" for cooling purposes (*id.* at 60a–75a). In the court's view, the "surplus water" clause, unlike the "project works" clause, "reflects an explicit concern with utilizing water resources to defray the cost of waterway improvements as well as a concern with

comprehensive water resource management" (*id.* at 72). It "was intended to afford the FPC a broad licensing authority over federally controlled waters" (*ibid.*).

The court did not attempt to define "surplus water" and did not decide whether the six plants involved in this case are within the Commission's licensing jurisdiction under that clause. It held, however, "that the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants," and it remanded the case to the Commission "to determine in the first instance whether the plants involved in this appeal fall within the category asserted by petitioners" (*id.* at 75a). The court specified that, "[i]n determining this question, the Commission should also consider whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency" (*ibid.*).[2]

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[2] The court stated that some legislation enacted after Section 4(e) may have "diluted Commission authority" to manage federal water resources (App. A, *infra*, p. 73a). The reclamation acts, flood control acts, and Tennessee Valley Authority legislation, for example, "obviously cut into FPC authority to regulate the utilization of surplus water or power" (*id.* at 74a), because those acts empower the Secretary of the Interior, the Secretary of the Army, and the TVA to dispose of any surplus water from dams they operate. Consequently, "it is apparent that in every case involving a contention of the applicability of the 'surplus water' clause, the FPC will have to consider the interrelationship of its enabling act and the scope of the authority of the Government agency responsible for the particular Government dam" (*ibid.*).

## REASONS FOR GRANTING THE WRIT

The decision of the court of appeals is contrary to 54 years of consistent administrative construction of the Federal Power Act and conflicts with the clear implications of an opinion of this Court. Whether the Commission's licensing jurisdiction extends to thermal-electric generating plants is, moreover, a question of substantial practical importance, potentially affecting the status of nearly 200 existing steam plants as well as many future plants. Notwithstanding its interlocutory posture, the decision, in the Commission's judgment, threatens seriously to impede the expeditious financing and construction of new, urgently needed, thermal-electric power plants.

1. The court of appeals correctly concluded in the "project works" section of its opinion that "[t]he history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydro-electric power" (App. A, *infra*, p. 35a) and that "[s]team plants were purposely omitted from the congressional scheme" (*id.* at 53a). The court also correctly stated that, "[i]n recognition of the intent of Congress as expressed in the Act, the newly created Commission in its first annual report determined that its licensing jurisdiction extended only to construction of water power projects" (*id.* at 37a). "The Commission has adhered to this position consistently since 1921" (*id.* at 38a), and the "consistent administrative construction * * * commands our respect; indeed, it is entitled to 'great weight'" (*id.* at 39a).

The court's opinion does not explain why the "consistent administrative construction" is entitled to any less weight with respect to the "surplus water" clause. The Commission's contemporaneous interpretation of the scope of its licensing jurisdiction under the Act, and its subsequent statements and practice supporting that interpretation, relate to the "surplus water" clause no less than to the "project works" clause. It has never thought that its existing licensing jurisdiction under any part of Section 4(e) extends to thermal-electric plants. It has, instead, consistently viewed the "surplus water" clause, like the "project works" clause, as applying only to plants that use water to generate hydroelectric power.

2. This long-standing interpretation by the Commission of its own jurisdiction has been recognized and implicitly approved by this Court. In *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, this Court upheld the Commission's determination that a license is required for the construction of a pumped-storage hydroelectric plant to be located on a non-navigable tributary of a navigable stream. The Court reasoned that the project was within the Commission's jurisdiction because it would generate electricity for interstate transmission, regardless of whether the project would affect downstream navigability.

The dissenting Justices argued, however, that the logic of the Court's reasoning would, contrary to the legislative history and the Commission's own view, extend the Commission's licensing jurisdiction to steam plants that are located on a stream over which

Congress has authority and that generate electricity for interstate transmission (381 U.S. at 114–115). The Court replied that the Act "is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission" (*id.* at 110).[3]

The court of appeals, while relying on the clear implications of *Union Electric* in the "project works" part of its opinion (App. A, *infra*, pp. 43a–46a), interpreted the "surplus water" clause in a manner that cannot be reconciled with this Court's reasoning in *Union Electric*. The court of appeals' holding that the Commission has jurisdiction to license steam plants that use "surplus water" for cooling purposes is contrary to the views of all nine Justices in *Union Electric*.

3. The court of appeals' decision would have a substantial impact upon the Commission and upon existing and future thermal-electric generating plants. The Commission estimates that there are 199 steam plants, both fossil and nuclear fueled, that use cooling water drawn either from a reservoir created by a federal

[3] The Court had stated earlier in its opinion that "[t]he principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy" (381 U.S. at 99). See, also, *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, 180, n. 23 (the "Act was distinctly an effort to provide federal control over and give federal encouragement to water power development").

dam or from a stream downstream from a federal dam. Each of these plants may, under the court's view of the statute, be using "surplus water * * * from [a] Government dam" (16 U.S.C. 797(e)) and may therefore require a license. In addition, the Commission estimates that approximately 132 new steam plants, many of which would potentially be subject to "surplus water" licensing, are planned for construction during the next four years.

The Commission does not have existing staff that could be assigned to a program of licensing steam-electric plants, and it estimates that the task would require additional manpower and resources equal to that now devoted to the licensing of hydroelectric projects.[4] Even assuming that funds to support such a program could be made available and that the needed staff could be quickly recruited and trained, the licensing process would be protracted. The Commission's staff estimates that licensing would add at least two years to the lead-time for planning new steam-electric installations. Significantly more time would be required at the outset because of the problems of getting a new program started and because of the initial flood of applications that would have to be processed. Protracted hearings in cases involving protests and interventions would also greatly extend the time consumed in the licensing process.

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[4] In Fiscal Year 1974, the Commission has 209 staff positions designated for hydroelectric licensing work. The direct cost of the program in FY 1974 is estimated to be $4,694,000. The Commission has a large backlog of work in its hydroelectric licensing program.

The resulting delays in the installation of new generating capacity could, in the Commission's judgment, seriously affect the reliability and adequacy of the Nation's electric power supply in a time of critical energy supply shortages. Because of the magnitude of the decision's practical impact and the urgent need for new electric power installations, it is important that the issue be promptly resolved by this Court.

There are, moreover, additional reasons why review of the court of appeals' judgment is appropriate at this stage despite the interlocutory nature of the case. A remand to the Commission for a factual determination of whether the particular plants involved in this case will use surplus water from a government dam and, if so, whether the Commission's jurisdiction "is affected in any way by the jurisdiction of any other federal agency" (App. A, *infra*, p. 75a)—to be followed perhaps by further review in the court of appeals—would consume approximately one to two years. Even if the jurisdictional issue would then be ripe for presentation to this Court, the uncertainty created by the present decision in the intervening period could itself have a serious adverse effect on the Nation's electric energy supply.

In the Commission's judgment, the uncertainty concerning licensing requirements for steam plants could endanger the financing of new power projects. The absence of statutory licensing criteria for steam plants and the inevitable delays in any licensing process would add further elements of risk to a proposed project. Private investment might thereby be deterred,

and authorization of public bond issues might be made more difficult by uncertainty as to whether a license is needed.

The immediate problem is likely to be exacerbated by extensive litigation. The District of Columbia Circuit is always available as a forum to review a Federal Power Commission order (16 U.S.C. 825*l*(b)), and the court's decision opens up numerous possibilities for litigation. For example, the decision leaves open the definition of "surplus water," the proper standards to be applied in licensing its use, the criteria by which to determine whether the authority of another federal agency overlaps with or supersedes the Commission's authority to license the use of "surplus water," and the effect of such a determination on the Commission's licensing jurisdiction. It also raises the possibility of litigation concerning the preparation of environmental impact statements by the Commission in connection with the licensing of steam plants.

Litigation on these and other issues may further retard the planning, financing, and construction of needed power plants during the next several years. If, as we submit and this Court's *Union Electric* opinion suggests, the Commission has no licensing jurisdiction over steam plants, then none of these issues need be decided by the Commission or the courts and none of these uncertainties need further burden the difficult task of meeting the Nation's expanding power needs.

Moreover, the Commission's jurisdiction under the "surplus water" clause presents a straightforward and discrete issue of statutory interpretation that can appropriately be decided in the present posture of the case. In view of the immediate impact of the uncertainty that has been generated by the court of appeals' decision, we submit that this is an appropriate case in which to review the court's judgment without awaiting the results of a remand.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT H. BORK,
*Solicitor General.*

MARK L. EVANS,
*Assistant to the Solicitor General.*

LEO E. FORQUER,
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*Attorneys,*
*Federal Power Commission.*

MAY 1974.

# APPENDIX A

## United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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No. 71-2012

THE CHEMEHUEVI TRIBE OF INDIANS *et al.*, PETITIONERS

v.

FEDERAL POWER COMMISSION, RESPONDENT

ARIZONA PUBLIC SERVICE COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, UTAH POWER & LIGHT COMPANY, DEPARTMENT OF WATER & POWER OF THE CITY OF LOS ANGELES, EL PASO ELECTRIC COMPANY, NEVADA POWER COMPANY, SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT & POWER COMPANY, SOUTHERN CALIFORNIA EDISON COMPANY, and TUCSON GAS & ELECTRIC COMPANY, INTERVENORS

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Petition for Review of Orders of the Federal Power Commission

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Decided November 9, 1973

*Joseph J. Brecher*, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, for petitioners. *Reid Chambers* and *Edward Berlin* also entered appearances for petitioners.

*Daniel Goldstein*, Assistant General Counsel, Federal Power Commission, with whom *Gordon Gooch*, General



[illegible]

Counsel, *Leo E. Forquer*, Solicitor, and *George W. McHenry, Jr.*, First Assistant Solicitor, Federal Power Commission, were on the brief, for respondent. *J. Richard Tiano*, Deputy Solicitor, Federal Power Commission, at the time the record was filed, also entered an appearance for respondent.

*Harry A. Poth, Jr.*, with whom *Richard M. Merriman*, *Peyton G. Bowman, III*, and *Robert T. Hall, III* were on the brief, for intervenor Arizona Public Service Company and certain other intervenors.

*Edward P. Nelsen* and *Robert W. Tollen* were on the brief for intervenor San Diego Gas & Electric Company.

*Sidney G. Baucom* and *Robert Gordon* entered appearances for intervenor Utah Power & Light Company.

*Edward C. Farrell* entered an appearance for intervenor Department of Water & Power of the City of Los Angeles.

*William Duncan* entered an appearance for intervenor El Paso Electric Company.

*Samuel P. Cowley* entered an appearance for intervenor Nevada Power Company.

*Leroy Michael* entered an appearance for intervenor Salt River Project Agricultural Improvement & Power District.

*John R. Bury* entered an appearance for intervenor Southern California Edison Company.

Before WRIGHT, TAMM and MCCREE,* *Circuit Judges.*

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* Of the Sixth Circuit, sitting by designation pursuant to 28 U.S.C. § 291(a) (1970).

Opinion for the court filed by *Circuit Judge* McCree.

McCree, *Circuit Judge:* Thermal electric power plants, or "steam plants," whether fossil-fueled or nuclear-fired, require large amounts of water to cool and thereby condense the steam after it passes through turbine rotors. In this appeal, we must decide whether fossil-fueled steam plants that obtain their cooling waters from a major river system of the United States in a manner affecting its navigability are subject to the licensing jurisdiction of the Federal Power Commission (FPC) under Part I of the Federal Power Act, 16 U.S.C. §§ 791a-823 (1970).

Petitioners contend that the FPC has authority to license these plants; the Commission asserts, as it has since 1921, that it does not.

Petitioners [1] filed with the FPC on September 10, 1971,

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[1] Complainants Chemehuevi Tribe and Cocopah Tribe of Indians live on reservations along the Colorado River and assert an interest in the quality and quantity of the river waters. The Chemehuevi Tribe also claims it is threatened by air pollution from some of the plants in question. Complainant Sierra Club is a national organization interested in the conservation of unspoiled, wild, and scenic areas of the United States, and it claims that its particular interest in protecting the "unparalleled scenic and recreational attractions of the Southwestern United States" would be affected by the activities of the power plants. Complainant Committee to Save Black Mesa, Inc. is a nonprofit organization headquartered on the Navajo Indian reservation in Arizona that disseminates information regarding the consequences of power plants or mining activities near the reservation and is composed of persons residing on the reservation whose health, welfare, and esthetic enjoyment of the area allegedly will be adversely affected by the activities of the power plants in question. Complainants Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay are Navajo Indians residing on a reservation near the Four Corners

a complaint and petition for an order to show cause[2] requesting the Commission to require ten public utilities located in the southwestern United States[3] (in the so-called Four Corners area) to obtain licenses for six fossil-fueled plants being constructed along the Colorado River and its tributaries. The complaint asserted that the plants are part of a vast power pool being created in the southwestern United States by the utilities and that the energy generated within the pool will be transmitted in interstate commerce to load centers as far as 600 miles away. The six plants described in the complaint are: 1) the Four Corners Plant, located on the Navajo Indian Reservation near Farmington, New Mexico, which has five coal-fired generating units in commercial operation, a current installed capacity of 2,087 megawatts, and a proposed total capacity of about 6,000 megawatts,[4] and, according to the complaint, withdraws about 34,000 acre feet of water per year from the San Juan River;[5] 2) the Mohave Plant, on the Colorado River three miles downstream from the Davis Dam in the southeast corner

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power plant, who claim that their health and welfare is severely threatened by the activities of that plant and the other plants.

[2] See 18 C.F.R. §§ 1.6(a), (d) (1972).

[3] The utilities are the Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, Salt River Project, Tucson Gas & Electric Company, El Paso Electric Company, Los Angeles Department of Water & Power, Nevada Power Company, Utah Power & Light Company, and San Diego Gas & Electric Company.

[4] The sources of these figures are the complaint and the intervenor brief, in this court, of eight of the named utilities.

[5] An acre foot of water is the amount required to cover one acre of land with one foot of water.

of Nevada, with two 750,000-kilowatt coal-fired units in commercial operation, which withdraws 30,000 acre feet of water per year from the Colorado River; 3) the Navajo Plant, under construction on the Navajo Indian Reservation four miles east of Page, Arizona, in the extreme north of Arizona, which will have three 770,000-kilowatt coal-fired units in commercial operation by the spring of 1976, and will withdraw 34,100 acre feet of water per year from Lake Powell, the reservoir created by the Glen Canyon Dam on the Colorado River in northern Arizona and southern Utah; 4) the Kaiparowits Plant, to be constructed on federally owned land in southern Utah about 20 miles north of Page, Arizona, with initial planned installed capacity of 2,000 megawatts and possible ultimate capacity of 6,000 megawatts, which will withdraw 102,000 acre feet of water per year from Lake Powell; 5) the San Juan Plant, under construction on federal land near Farmington, New Mexico, with planned initial capacity of 330,000 kilowatts and possible ultimate capacity of 990,000 kilowatts, which is scheduled to begin operation in the summer of this year and will withdraw 20,200 acre feet of water per year from the San Juan River; 6) the Huntington Canyon Plant, being constructed in part on federal land about 29 miles from Price, Utah, which will consist initially of one coal-fired unit of 430,000 kilowatts and will begin operation in 1974, with a second unit planned for 1977 and possibly two additional units thereafter, for a total possible capacity of 2,000 megawatts, and will withdraw 30,000 acre feet of water per year from Huntington Creek for use with the initial generating unit.

The complaint asserted that the Commission has licensing authority over the Four Corners plants under § 4(e) of the Federal Power Act, 16 U.S.C. § 797(e) (1970),*

* 16 U.S.C. § 797(e) (1970) provides, in pertinent part:

[Footnote continued on page 6]

because the utilities are constructing and operating "project works," *see* 16 U.S.C. §§ 796(11), (12) (1970),[3]

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[3] [Continued]

The commission is authorized and empowered—

. . .

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and, maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided:

16 U.S.C. §§ 796(11), 796(12) (1970) provide:

(11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dam and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and

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for the development, transmission, and utilization of electric power across and along "navigable waters," *see* 16 U.S.C. § 796(8) (1970);[8] that the above-described withdrawals of water from the Colorado River system by the six power plants will affect the navigability of these navigable waters; that the Navajo and Kaiparowitz plants will use "surplus water," *see* 16 U.S.C. § 797(e) (1970),[9] impounded by a "government dam," *see* 16 U.S.C. § 796(10) (1970);[10] and that some of the six plants are or will be located on public lands or reserva-

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occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

(12) "project works" means the physical structures of a project. . . .

[8] 16 U.S.C. § 796(8) (1970) provides:

(8) "navigable waters" means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority; . . .

[9] *See* note 6 *supra*.

[10] 16 U.S.C. § 796(10) (1970) provides:

(10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others. . . .

tions of the United States, *see* 16 U.S.C. §§ 796(1), 796(2)." After alleging that the six plants are likely to create severe air and water pollution, threaten the integrity of many natural, historical, and recreational resources, and disrupt the ecology and despoil the environment of the Four Corners region, the complaint stated that only a "single legal issue" was presented: "does the Federal Power Commission have licensing jurisdiction over steam plants generating and transmitting energy in interstate commerce, which withdraw large quantities of water from navigable streams for cooling and other plant purposes?" Because the plants were under construction and because only a question of law was involved, petitioners requested an expedited procedure and requested the FPC to order the utilities to show cause why they should not be required to suspend all development and construction of the plants pending the conclusion of this proceeding.

On their request, the utilities were given until November 9, 1971, to file answers to the complaint. On October 18, 1971, the Utah Power & Light Company filed an answer denying most of the allegations of the complaint and moved to dismiss the complaint for failure to state a claim upon which relief could be granted, for

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[11] 16 U.S.C. §§ 796(1), 796(2) (1970) provide:

(1) "public lands" means such lands and interest in lands owned by the United States as are subject to private appropriation and disposal under public land laws. It shall include "reservations", as hereinafter defined;

(2) "reservations" means national forests, tribal lands embraced within Indian reservations, military reservations, and other lands and interests in lands owned by the United States, and withdrawn, reserved, or withheld from private appropriation and disposal under the public land laws; also lands and interests in lands acquired and held for any public purposes; but shall not include national monuments or national parks;...

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lack of subject matter jurisdiction, and for laches with respect to the Huntington Canyon Plant. Before any other answers were filed, however, the Commission on November 4, 1971, *sua sponte* issued an order dismissing the complaint for lack of jurisdiction.

In its order, the Commission stated that its licensing authority under Part I of the Federal Power Act extended to the licensing of "project works" and that thermal electric generating plants are not "properly classifiable" as project works within the meaning of 16 U.S.C. §§ 796(11), (12) (1970). This conclusion was based on brief references to the preamble of the Act as originally enacted in 1920, to the legislative history of the Act, to the long-standing FPC interpretation of its powers under the Act, and to the decision of the Supreme Court in *Federal Power Commission v. Union Electric Company*, 381 U.S. 90, 110 (1965) (the *Taum Sauk* case), all of which support the determination that the Commission has licensing authority over hydroelectric plants only, *i.e.*, plants generating electricity by water power.

On November 10, 1971, complainants filed an application for rehearing, pursuant to 16 U.S.C. § 825*l*(a) (1970). The application asserted that the structures and operations of the six plants came within the literal language of 16 U.S.C. § 797(e) (1970), because

> [t]he facts in this case demonstrate clearly that water conduits, power houses and transmission lines have been and are being constructed for the purpose of generating and transmitting electricity in interstate commerce; that surplus water from behind the Bureau of Reclamation's Glen Canyon Dam will be utilized for this purpose; and that much of the facilities in question will be and are located on public lands and reservations of the United States.

In addition, the application contended that consistent administrative failure to regulate was not conclusive of the jurisdictional issue because "consistent error is still error," *Phillips Petroleum Company v. Wisconsin*, 347 U.S. 672, 678 n.5 (1954), and that the lack of explicit jurisdictional authority in an agency's enabling statute does not preclude the agency from exercising jurisdiction when appropriate to the performance of the agency's function, *United States v. Southwestern Cable Company*, 392 U.S. 157 (1968). Finally, the application suggested that the statements in the *Taum Sauk* case about the lack of FPC jurisdiction to regulate steam plants were obiter dictum and thus not determinative of a subsequent proceeding squarely presenting the issue.

On December 10, 1971, the FPC issued an order denying the application for rehearing. Complainants then filed a petition in this court on December 14, 1971, to review the Commission's orders. *See* 16 U.S.C. § 825*l* (b) (1970).[12] By order dated February 4, 1972, the

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[12] Under 16 U.S.C. § 825*l* (b) (1970), "[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the . . . United States Court of Appeals for the District of Columbia . . . ." Although it makes no practical difference in the result in this case, we observe that complainant Sierra Club does not have standing to seek review of the Commission's orders in this court because it has not satisfied the "injury in fact" test enunciated in *Sierra Club v. Morton*, 405 U.S. 727 (1972). Here, as in *Sierra Club*, the club

> failed to allege that it or its members would be affected in any of their activities or pastimes by the [Four Corners] development. Nowhere in the pleadings . . . did the Club state that its members use [the Colorado River system and the surrounding area] for any purpose, much less that they use it in any way that would be

utilities named in the complaint were allowed to intervene in these proceedings.

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significantly affected by the proposed actions of the respondents.

405 U.S. at 735. It is true that the decision in *Sierra Club* construed § 10 of the Administrative Procedure Act, 5 U.S.C. § 702 (1970), which is not involved in this case. However, the language of § 313(b) of the Federal Power Act is identical to that of § 10 of the Administrative Procedure Act—both refer to a "party" who is "aggrieved" by agency action, *see Citizens Comm. for Hudson Valley v. Volpe*, 425 F.2d 97, 101 (2d Cir.), *cert. denied*, 400 U.S. 949 (1970)—and the opinion in *Sierra Club* discussed cases arising under other judicial review statutes interchangeably with those involving only the Administrative Procedure Act. *See* 405 U.S. at 736-40 & n.14.

It is interesting to observe that 18 C.F.R. § 1.6(a) (1972) allows the filing of a complaint with the FPC by "[a]ny person . . . complaining of anything done or omitted to be done by any . . . public utility . . . in contravention of an act . . . administered" by the Commission. Thus, the Sierra Club had standing to initiate the licensing proceeding before the Commission, and it can be argued that this made it a "party" that was aggrieved when the FPC dismissed the complaint. However, the fact that a person is a party in agency proceedings does not require that he be allowed to seek judicial review of the agency's action; he must still satisfy judicial standing requirements. *See Pittsburgh & West Virginia Ry. Co. v. United States*, 281 U.S. 479, 486 (1930); 3 K. Davis, *Administrative Law Treatise* 241 (1958); Shapiro, *Some Thoughts on Intervention Before Courts, Agencies, and Arbitrators*, 81 Harv. L. Rev. 721, 728, 767 (1968). *But cf. Office of Communication of United Church of Christ v. FCC*, 123 U.S. App. D.C. 328, 359 F.2d 994, 1000 n.8 (1965).

I

At the outset, it is important to consider briefly the factual background of the problems presented by the issues in this case.

Although estimates of the precise rate of growth vary, it is undisputed that the demand for electric power--as well, of course, as that for other kinds of energy—is increasing at a staggering rate. According to one source,[11] consumption of electric power is growing by 9% per year, and demand for it is expected to double during each of the next two or three decades. The expected 250% increase in the demand for electric energy between 1970 and 1990 will require at least 255 new thermal-electric plants of 500,000 kilowatts to 2,000 megawatts capacity.[12] Ninety-one of these plants will be fossil-fuled; 164 will be nuclear-fired.[13] Hydroelectric plants are not expected to play more than a very minor role in satisfying this burgeoning demand for electric power both because most of the good hydroelectric sites are being fully utilized and because thermal-electric plants

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[11] N. Fabricant & R. Hallman, *Toward a Rational Power Policy: Energy, Politics, and Pollution* 5 (1971). *See also* Ramey & Murray, *Delays and Bottlenecks in the Licensing Process Affecting Utilities: The Role of Improved Procedures and Advance Planning*, 1970 Duke L.J. 25, 31-32; Tarlock, Tippy & Francis, *Environmental Regulation of Power Plant Siting: Existing and Proposed Institutions*, 45 S. Cal. L. Rev. 502 (1972); Comment, *Thermal Electric Power and Water Pollution: A Siting Approach*, 45 Ind. L.J. 61, 62 (1970).

[12] *See* Ramey & Murray, *supra* note 13, at 32 n.31, citing Energy Policy Staff, Office of Science and Technology, *Considerations Affecting Steam Power Plant Site Selection* 4 (1968); Smith, *Electricity and the Environment—The Generating Plant Siting Problem*, 26 Bus. Law. 169 (1970).

[13] *See* Ramey & Murray, *supra* note 13, at 34.

are more effective in producing the great quantities of electricity required."

The manner in which thermal-electric plants generate electricity has been simply described as follows:

> Steam electric plants generate electricity by the thermo-dynamic process known as the Rankine Cycle. Heat produced by burning fossil fuel or nuclear materials turns water into steam. The steam passes through a turbine at high pressure and temperature, turning the turbine which in turn drives a generator to produce electricity. After leaving the turbine, the steam goes into a condenser, where the steam gives off its excess heat to the cooling water circulating in the condenser, is condensed to water and returned to the boiler or reactor to repeat the cycle."

About two-thirds of the heat generated by burning the fuel source becomes waste heat that is absorbed by the cooling waters in the condenser,[14] and this results in a considerable elevation of the temperature of these waters. The heated water is then ordinarily returned directly to the water body from where it had been pumped into the condenser. This "once-through" cooling process for thermal-electric plants accounts for over 80% of the total cooling-water used nationally and almost one-third of the total water used for all purposes.[15] The tremendous projected growth in the production of thermal-electric power is expected to increase cooling requirements from 120 billion gallons a day in 1971, about 10% of the average daily runoff in the continental United States, to 200

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[13] *Id.* at 32; *see* FPC, *National Power Survey* 93 (1964).

[14] N. Fabricant & R. Hallman, *supra* note 13, at 73; *see* Comment, *supra* note 13, at 65.

[15] N. Fabricant & R. Hallman, *supra* note 13, at 52.

[16] *Id.*

billion gallons a day by 1980 and to 600 billion gallons a day by 2000; an amount equivalent to 50% of the average daily runoff in the United States.[20]

When the cooling waters are discharged directly into receiving water without having passed through cooling towers,[21] they may be 10 to 20 degrees (Fahrenheit) warmer than the receiving water.[22] Thermal discharges can cause severe damage to the aquatic ecosystems of the receiving waters.[23] If evaporative cooling towers are used to cool the waters leaving the condensers, the immediate environment may be adversely affected and large quantities of water may be permanently lost to the water source from which the cooling waters were obtained.[24]

In addition, fossil-fueled steam plants are notorious sources of air pollution. Nationally, they contribute about 50% of all sulfur oxides, 25% of all nitrogen oxides, and 25% of all particulate matter discharged into the at-

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[20] *Id.* at 52-53. Apart from the increase in the number of plants, much of this dramatic rise in cooling water requirements can be explained by the anticipated proliferation of nuclear-fired plants, which under present technology produce about 50% more heat than do fossil-fueled plants. *See id.* at 6, 53; Tarlock, Tippy & Francis, *supra* note 13, at 508; Comment, *supra* note 13, at 63-64.

[21] For a description of the operations of cooling towers, *see* Comment, *supra* note 13, at 71 n.25. Alternatives to direct heat discharge are discussed in *id.* at 71-72 n.25, and Tarlock, Tippy & Francis, *supra* note 13, at 509-10.

[22] N. Fabricant & R. Hallman, *supra* note 13, at 52.

[23] *See id.* at 53-55; Tarlock, Tippy & Francis, *supra* note 13, at 508-09; Comment, *supra* note 13, at 65-70.

[24] *See* Comment, *supra* note 13, at 71 n.25.

mosphere.[25] Moreover, the construction and operation of these huge complexes, the erection of hundreds of miles of overhead transmission lines, and the utilization of dams, pumps, and pipes in and along adjacent waterbodies disrupt the areas surrounding power plants.

We are told by petitioners that the six plants involved in this appeal have already had a significant detrimental impact in the Four Corners region and that this impact can be expected to become much more pervasive as all six plants become operational and plant capacity is increased. The environmental impact statement prepared by the Federal Bureau of Reclamation for the Navajo Project,[26] petitioners say, indicates that the six plants will evaporate most of the water they withdraw for cooling purposes. Thus, up to a quarter million acre feet of water would annually be withdrawn permanently from the Colorado River system, or over 2% of the 10-year average flow of the Colorado River at Lee Ferry, Arizona, of 12.1 million acre feet of water per year for the period 1958-67.[27] Petitioners claim that the projected increase in electric-power generation in the Colorado River basin will increase the permanent withdrawal to 5% by 1990. Petitioners also contend that studies and hearings by various state and federal officials have confirmed the

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[25] *See* N. Fabricant & R. Hallman, *supra* note 13, at 15; Tarlock, Tippy & Francis, *supra* note 13, at 510-12.

[26] *See* 42 U.S.C. § 4332(2)(C) (1970).

[27] *See* H.R. Rep. No. 1312, 90th Cong., 2d Sess. (1968), in 3 U.S. Code Cong. & Ad. News 3666, 3683-84 (1968). The average flow from 1891 to 1967 was 11 million acre feet, with a high of 24 million acre feet in 1917 and a low of 5.6 million acre feet in 1934. *Id.* By 1967 the Colorado River was already "over-committed" by contract, compact, and judicial decree, according to the House Committee on Interior and Insular Affairs. *Id.* at 3669-70.

assertions of area residents that the Four Corners plants are heavily polluting the air of the region in violation of state and federal standards and that other activities harmful to the environment including strip mining are being undertaken in conjunction with operating the plants.[29]

It is thus in the context of an increasing competition between the need for power and the importance of preserving public resources, between virtually unregulated growth and constraints required by concern for present-day and long-term environmental consequences, that we construe a statute that was enacted in an age in which the magnitude of these conflicts could not have been foreseen.

II

Petitioners contend that FPC jurisdiction is properly invoked under § 4(e) of the Federal Power Act for two reasons: either because the six plants identified in the complaint are "project works" necessary for the development of power along navigable waters or because the plants will utilize "surplus water" from Government dams. We will consider these contentions in turn.

A

It is true, as petitioners point out, that the literal language of § 4(e) appears to include steam plants. "Project," as defined in 16 U.S.C. § 796(11), means the complete unit of development of a power plant, including reservoirs and dams, and is not by its terms limited to hydroelectric plants. Under § 4(e), the Commission is empowered to license "project works"—the physical structures of a project—necessary or convenient for the "de-

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[29] *See, e.g.*, Sen. Comm. on Interior & Insular Affairs, 92d Cong., 1st Sess., *Problems of Electrical Power Production in the Southwest* (Comm. Print 1971); Comment, *The Four Corners Power Complex: Pollution on the Reservation*, 47 Ind. L.J. 701, 705-08 (1972).

velopment, transmission, and utilization of power across, along, from or in" waterways over which Congress has jurisdiction. Again, there is no mention of "hydroelectric power" as such. Under the "ordinary man" or "plain meaning" cannon of statutory construction, petitioners argue,[29] the utilities here are constructing facilities described by the Act, and there is, accordingly, no need to resort to legislative history or other extrinsic aids.[30]

In answering a similar argument, the Second Circuit has said:

> We reject this line of maxims of statutory construction in favor of Judge Learned Hand's more practical instruction that "[w]ords are not pebbles in alien juxtaposition," [*NLRB v. Federbush Co., Inc.*, 121 F.2d 954, 957 (2d Cir. 1941)] and therefore turn first to [the Act's] legislative history."

Our role is to give effect to the intention of Congress as it may be discerned by reference to the historical background of the legislation as well as to the particular words chosen by the Congress to express its purpose.[31] The use of extrinsic aids such as legislative history to determine congressional purpose is appropriate not only when the words of the statute are ambiguous but also "when the literal words would bring about an end com-

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[29] *See, e.g., Malat* v. *Riddell*, 383 U.S. 569, 571 (1966); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607, 618 (1943).

[30] *See, e.g., United States v. Oregon*, 366 U.S. 643, 648 (1961); *Packard Motor Car Co. v. NLRB*, 330 U.S. 485, 492 (1947); *Calvert Cliffs' Coordinating Comm. v. United States AEC*, 449 F.2d 1109, 1126 (D.C. Cir. 1971).

[31] *Colligan v. Activities Club of New York, Ltd.*, 442 F.2d 686, 689 (2d Cir.), *cert. denied*, 404 U.S. 1004 (1971).

[32] *See, e.g., FPC v. Tuscarora Indian Nation*, 362 U.S. 99, 126 (1960) (Black, J., dissenting).

pletely at variance with the purpose of the statute." [33] In our case, the history of the Federal Power Act, other provisions of the Act, developments occurring after its enactment, and the uniform (with one notable exception) expression of judicial and scholarly commentators compel the conclusion that the structures comprising thermal-electric plants are not "project works" required to be licensed by the FPC under § 4(e).

Part I of the Federal Power Act was enacted originally as the Federal Water Power Act in 1920.[34] It was the first federal legislation to provide for comprehensive management of the nation's waterways, and it was also the first federal attempt to regulate significantly the production of power.

The earliest federal efforts, which culminated in the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403 (1970),[35] were aimed at preventing obstruction of nav-

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[33] *United States v. Public Utilities Comm'n of Calif.*, 345 U.S. 295, 315 (1953); *cf. Preiser v. Rodriguez*, 41 U.S.L.W. 4555, 4559 (U.S. May 7, 1973).

[34] A colorful and detailed account of the events preceding its passage is contained in J. Kerwin, *Federal Water-Power Legislation* (1926). *See also* Fly, *The Role of the Federal Government in the Conservation and Utilization of Water Resources*, 86 U. Pa. L. Rev. 274 (1938); Pinchot, *The Long Struggle for Effective Federal Water Power Legislation*, 14 Geo. Wash. L. Rev. 9 (1945); Comment, 39 Mich. L. Rev. 976 (1941).

[35] 33 U.S.C. §§ 401, 403 (1970) provide:

§ 401. Construction of bridges, causeways, dams or dikes generally

It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same

igable waterways. To achieve this end, the Act of 1899 requires the approval of Congress, the Secretary of the Army, and the Chief of Engineers before any dam, bridge or similar facility can be constructed in navigable waters of the United States, and prohibits the obstruc-

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shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army.

§ 403. Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in

The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

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tion of these waters even by activities undertaken only on nonnavigable tributaries.[36] A parallel course of legislation granted rights of way over public lands for purposes of irrigation and the generation of electric power,[37] and in 1901 authorized the Secretary of Interior to grant revocable permits for "electrical plants, poles and lines for the generation and distribution of electrical power" on rights of way through the public lands and forests of the United States.[38] In practice, however, the Secretary did not bother to issue formal permits, and hydroelectric generating structures were routinely erected on public lands or along navigable waters. Bills awarding power sites were routinely introduced in Congress and routinely approved.[39] The notable exception was President Roosevelt's veto[40] of a bill that would have awarded Muscle Shoals, Alabama—which later became the nucleus of the Tennessee Valley Authority system—to private interests.[41]

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[36] Earlier legislation included the Rivers and Harbors Acts of 1880 (21 Stat. 197), 1881 (23 Stat. 133), 1888 (25 Stat. 424-25), 1890, (26 Stat. 426, 454), and 1892 (27 Stat. 110). *See* Starr, *Navigable Waters of the United States—State and National Control*, 35 Harv. L. Rev. 154, 171 (1921); Kerwin, *supra* note 34, at 105-08; *See FPC v. Union Electric Co.*, 381 U.S. 90, 99 (1965); *Union Bridge Co. v. United States*, 204 U.S. 364 (1907); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899).

[37] Act of March 3, 1891, ch. 561, § 18, 26 Stat. 1101, *as amended*, 43 U.S.C. § 946 (1970); Act of May 14, 1896, ch. 179, 29 Stat. 120, *as amended*, 43 U.S.C. § 957 (1970). *See generally* Kerwin, *supra* note 34, at 105-08.

[38] Act of Feb. 15, 1901, ch. 372, 31 Stat. 790, *as amended*, 43 U.S.C. § 959 (1970). This legislation superseded the legislation of 1896 (*see* note 37 and accompanying text). *Utah Power & Light Co. v. United States*, 243 U.S. 389, 407 (1917).

[39] Pinchot, *supra* note 34, at 11.

[40] *See* 36 Cong. Rec. 3071 (1903).

[41] *See* Pinchot, *supra* note 34, at 11; *see generally* Kerwin, *supra* note 34, at 58-110.

It should be observed at this point that hydroelectric power became a major power source in the United States about the turn of the 20th century because of the development of technology for the long-distance transmission of electricity. Before that time, steam power had become the chief source of power in the United States,[42] and has remained so to the present day.[43] The development of commercially feasible techniques for the production of electricity in the 1870's, and the establishment of the first large-scale electric generating plants in the 1880's, did not inaugurate a rapid expansion of the electric power industry because the transmission of power by direct current was too inefficient over long distances. However, with the development of alternating current in the late 19th century, the problem of power loss over long distances was solved, and hydroelectric power sites on major rivers or public lands distant from large cities became common.[44] It was the escalating private appropriation of these sites that evoked the early federal regulatory initiatives.

Following the transfer of responsibility for the national forests to the Forest Service of the Department of Agriculture in 1905,[45] the Secretary of Agriculture began to

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[42] *See* Kerwin, *supra* note 34 at 13-57; Pinchot, *supra* note 31, at 9; *see also* note 124 *infra*.

[43] In *Udall v. FPC*, 387 U.S. 428, 445-47 n.11 (1967), the Court indicated that in 1960, hydroelectric power accounted for 3.9% of the energy requirements of the United States, nuclear power, 0.1%, and fossil fuels, 96%. By the year 2000, hydroelectric power is expected to provide only about 2% of our energy, nuclear power from 11% to 23%, and fossil fuels from 75% to 84%. *Id.* By 1990, nuclear plants will provide about one-fourth of our electric power. Comment, *supra* note 13, at 61 n.6. *See* note 130 *infra*.

[44] *See* Kerwin, *supra* note 34, ch. 1; 1 FPC, *National Power Survey* chs. 1, 2, 4, & 6 (1964).

[45] Act of Feb. 1, 1905, ch. 288, 33 Stat. 628, codified in 16 U.S.C. § 472 (1970).

issue permits for 50-year periods for rights of way in the forests for the generation and transmission of water power. A fee system was also established,[46] although the charges at first were hardly more than nominal. Nevertheless, permits were still granted as a matter of course, and power sites were still routinely awarded by Congress to private power interests. And no efforts were made to coordinate the many different uses of public lands and navigable waters for the purpose of promoting the comprehensive development of the major river systems in the public interest.

Beginning in 1906, the first halting steps in that direction were taken. The General Dam Act[47] of that year provided that, when Government permission was granted to construct a dam for water power or any other purpose in any navigable waters, the plans and specifications for the dam and "all accessory works" had to be submitted to the Secretary of War and the Chief of Engineers for approval. These two officials were expressly authorized to impose conditions on construction that were deemed necessary to protect the present and future interests of the United States, including the condition that the permittees construct structures "necessary in the interests of navigation." The Act was intended by its framers to permit the development of water power while facilitating the improvement of stream navigability by the Government through the utilization of private capital.[48]

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[46] *See United States v. Colorado Power Co.*, 240 F. 217 (D. Colo. 1916); Kerwin, *supra* note 34, at 77-78, 143-53; Pinchot, *supra* note 34, at 11-15.

[47] Act of June 21, 1906, ch. 3508, 34 Stat. 386.

[48] *See* Kerwin, *supra* note 34, at 113.

In 1910, the Act was amended [49] to provide that in acting on the plans submitted, the two above-named federal officials "shall consider the bearing of said struc-

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[49] Act of June 23, 1910, ch. 360, 36 Stat. 593. The Act in its amended form can be found in 33 U.S.C.A. at pp. 25-27. The amendment was inspired by President Roosevelt's vetoes of the Rainy River bill in 1908 (42 Cong. Rec. 4698 (1909) and the James River bill in 1909 (43 Cong. Rec. 978 (1909)) for the stated reasons, *inter alia*, that no charges or time limits had been set for these awards of permits for water power development in the named rivers. *See* Kerwin, *supra* note 34, at 115-30; Pinchot, *supra* note 34, at 16-17. In *FPC v. Union Electric Co.*, 381 U.S. 90, 98-99 n.11 (1965), the Court referred to the Rainy River veto as the "keynote" of "movement toward the enactment of" the federal Water Power Act of 1920, and it quoted the following passage from the President's veto message:

> "We are now at the beginning of great development in water power. Its use through electrical transmission is entering more and more largely into every element of the daily life of the people. Already the evils of monopoly are becoming manifest; already the experience of the past shows the necessity of caution in making unrestricted grants of this great power.
>
> "It should also be the duty of some designated official to see to it that in approving the plans the maximum development of the navigation and power is assured, or at least that in making the plans these may not be so developed as ultimately to interfere with the better utilization of the water or complete development of the power."

Besides the 1910 amendment to the General Dam Act, the vetoes may have also inspired passage of the Act of 1911, 36 Stat. 1253, that authorized the Secretary of Agriculture to grant 50-year easements over public lands, forests, and reservations for electrical poles and lines. *See* Kerwin, *supra* note 34, at 109. *Cf. United States v. Oklahoma Gas & Electric Co.*, 318 U.S. 206, 213 (1943). The presidential vetoes were themselves anticipated by the President's appointment of the Inland Waterways Commission in 1903 (S. Doc. No. 325, 60th Cong., 1st Sess. (1908)) to generate a comprehensive plan "designed for the benefit of the entire country. Such a plan

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ture upon a comprehensive plan for the improvement of the waterway over which it is to be constructed with a view to the promotion of its navigable quality and for the full development of water power . . . ." The 1910 amendment also provided that the assessment of charges by the United States reflect the cost of maintaining the navigability of the affected river systems. Moreover, permits granted under the Act were made revocable and could not be granted for a period exceeding 50 years. At the expiration of the permit, the Government would pay the permittees the reasonable value of the dams and appurtenant works.

Despite these initiatives, however, the focus of federal efforts over the next few years remained on improving and maintaining the navigability of the major rivers. Thus, for example, the Weeks Act of 1911 [50] authorized the Secretary of Agriculture to acquire, upon recommendation of the National Forest Reservation Commission, denuded lands in the watersheds of headwaters of navigable waters to protect the navigability of those waters by making the lands available for reforestation.[51] The Government also engaged in sporadic efforts to impose the permit requirements of the 1901 legislation on power companies that had appropriated public lands for the building of hydroelectric facilities without seeking a fed-

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should consider and include all the uses to which streams should be put, and should bring together and coordinate the points of view of all users of waters." 42 Cong. Rec. 6963 (1908).

[50] 36 Stat. 961, codified in 16 U.S.C. §§ 480, 500, 513-19, 521, 552, 563 (1970).

[51] *See Young v. Anderson*, 160 F.2d 225 (D.C. Cir.), *cert. denied*, 331 U.S. 824 (1947); *United States v. Griffin*, 58 F.2d 674 (W.D. Va. 1932).

eral license,[52] and to require the payment of fees as a condition to retaining licenses previously issued.[53]

A congressional battle between private power interests and conservationists was touched off by the attempt of the former in July, 1912, to secure House of Representatives' approval of an Omnibus Water Bill that would have authorized the construction of seventeen major dam projects with no provision for a charge or other regulation by the Government.[54] The bill was eventually de-

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[52] *See Utah Power & Light Co.* v. *United States*, 243 U.S. 389 (1917).

[53] *See United States v. Colorado Power Co.*, 240 F. 217 (D. Colo. 1916). By 1915, the Government was collecting about $89,000 in administrative charges assessed for development of water power on the national forests. *See* Kerwin, *supra* note 34, at 202.

[54] *See* H.R. Rep. 1050, 62d Cong., 2d Sess. (1912). The conservationists, led by men such as Gifford Pinchott, head of the Forest Service under President Roosevelt and later Governor of Pennsylvania, decried what they saw as a great giveaway of the Nation's water resources to private interests and a callous disregard of the interest of the public in a comprehensive system of water management that would benefit the public at large. *See* Pinchot, *supra* note 34, at 11-20. Pinchot referred to private interests as "water power grabbers" (*id.* at 16) who were "eager for plunder," (*id.* at 18) and he characterized the battle as one "between private greed and the public good" (*id.*). *See generally* Kerwin, *supra* note 34, *passim*; Fly, *supra* note 34, at 291-92. These conservationists were concerned about the growing use of fossil fuels in the generation of other types of power, and they desired to encourage the growth of water power, under federal auspices, because of their perception of hydroelectricity as a virtually limitless—and cheap—source of power. Caught up as well in the rising public tide against private monopolization of the means of production, they sought to protect the right of the public to the power potential of water. As the House Report accompanying the Adamson Bill (*see* note 61 *infra*) put it:

[Footnote continued on page 26]

railed by President Taft's veto of the Coosa River bill on August 24, 1912, because the latter contained no provision for charging the permittee for the privilege of

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[54] [Continued]

> Experience has taught us that in the past the private monopolization of natural opportunities has not only deprived the general public of their natural right to a proper share of the benefit which should accrue from them, but such monopolization has given to those possessing it a proponderance [*sic*] of influence and of power in our industrial and civic life which is little short of a menace to our institutions.
>
> We have awakened none too soon to the necessity of preserving under public control these great natural opportunities for the creation of wealth, which belong to the public and which could constitute a serious source of danger to equal liberty and fair opportunity if transferred in perpetuity to private ownership.

H.R. Rep. No. 812, 63d Cong., 2d Sess. 11 (1914).

The opponents of the conservationists were those who believed that only the private development of the nation's water power resources could exploit those resources to a degree that would benefit the public, those who were against increasing centralization of government or increasing federal intervention in what they perceived to be essentially local or private affairs, and, of course, those who saw the private, unregulated generation of hydroelectric power as a profitable enterprise. *See* Kerwin, *supra* note 31, at 153-57 *passim*; Fly, *supra* note 43, at 289-90. Both groups agreed, however, that the existing system of federal regulation was undesirable because of its piecemeal approach and its generally restrictive effect on the large-scale development of water power.

The Dam Acts of 1906 and 1910 were considered inadequate by many because, although they did provide for charges, no fees were exacted for the privilege of obstructing navigable waters; permittees were merely required to compensate the Government for the costs of restoring prior conditions of navigability and for benefits provided by Government improvements. And, investment under the Acts was seen to be a risky proposition because of uncertainty about the disposition of the properties after 50 years had expired and because Con-

building the dam.[55] However, the battle lines had been drawn.[56] In all the legislative debates that followed, the primary line of demarcation between the opposing forces was this question of imposing charges on private developers of water power for being allowed to undertake such development.[57] The power interests, whose main influence lay in the Senate, argued that the federal government could not constitutionally charge a private developer for the privilege of generating water power on a navigable waterway if the United States had no interest in the surrounding lands and had made no expenditure itself for improvements at the development site. The conservationists, represented primarily in the House, countered with the argument that Congress could impose conditions on any grant of authority by it to obstruct navigable waters, and, since the Government could itself generate and sell water power at works it

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gress reserved the right to repeal or modify the Act without liability. *See* Kerwin, *supra* note 34, at 130. Although water power development on navigable streams had come to a standstill by 1912, development on the public lands, especially in the West, actually exceeded demand during this period. *See id.* at 39-42, 155-56.

An interesting expression of the point of view of the power interests can be found in Brown, *The Conservation of Water-Powers*, 26 Harv. L. Rev. 601 (1913), in which the author takes the position that the best way to "conserve" the nation's water power resources is to encourage private water power development. *See id.* at 601. *See also* Shields, *The Federal Power Act*, 73 U. Pa. L. Rev. 142 (1924).

[55] 48 Cong. Rec. 11796 (1912); *see* S. Doc. No. 949, 62d Cong., 2d Sess. (1912).

[56] *See* Kerwin, *supra* note 34, at 130-42; Pinchot, *supra* note 34, at 17-18.

[57] *See* Kerwin, *supra* note 34, at 79-98, 171-260.

constructed to facilitate navigation,[58] it could license a private company to develop the power in its stead, and could exact a reasonable fee as compensation for the license.[59] For our purposes, it is interesting to observe that the proponents of charges pointed out that steam plants were more expensive to operate than water power plants, and that therefore if a state public service commission fixed a flat rate to be charged by electric utilities, the water power plants would make excess profits. They argued that a federal charge on hydroelectric plants could result in those excess profits being used for the development of navigation. Thus, the contemplated charge for the privilege of developing hydroelectric power was seen as a way of equalizing the costs of hydroelectric and steam power, and thereby insuring that the rates paid by consumers would be equal.[60] It was this view, of course, that eventually prevailed.

Over the next few years, several bills were introduced in Congress by the respective factions, but none was able to pass both houses.[61] However, in 1920, a Wilson

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[58] *See United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1903); notes 167-70 *infra* and accompanying text.

[59] *See* Kerwin, *supra* note 34, at 95-98.

[60] *See* 52 Cong. Rec. 10450 (1916); Kerwin, *supra* note 34, at 199-200.

[61] A number of bills reflected the key philosophical differences between the power interests and the conservationists, as they differed substantially on the questions of charges, Government recapture, and the extent of Government regulation of plant operations: The Adamson Bill, which related to water power development on navigable waters, H.R. 16053, 63d Cong. 2d Sess. (1914); the Ferris Bill, which was concerned with the question of water power development on the public lands, H.R. 16673, 63d Cong., 2d Sess. (1914); H.R.

administration bill regulating the construciton of water power projects on navigable waters, public lands, and forest reserves was introduced.[62] The recent war, and

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408, 64th Cong., 1st Sess. (1916); the Myers Bill, which was the response of the power interests to the original wording of the Ferris Bill, H.R. 16673, 63d Cong., 3d Sess. (1914); S. 2399, 65th Cong., 1st Sess. (1917); *see* Hearings before the Sen. Comm. on Public Lands on H.R. 16673, 63d Cong., 3d Sess. (1914); and the Shields bill, S. 3331, 64th Cong., 1st Sess. (1915); S. 1419, 65th Cong., 1st Sess. (1917). For a discussion of the bills and the legislative debates, *see* Kerwin, *supra* note 34, at 172-216. The water power interests lobbied very heavily for the Shields Bill, and much of their considerable influence during this period was a consequence of their press campaign for the need of immediate development of water power for the manufacture of nitrates necessary for ammunition for the impending war. But the Shields Bill, like the others, was never passed by more than one house. *See id.* at 207-10.

[62] In 1917, President Wilson had directed his Secretaries of War, Interior, and Agriculture to prepare a similar bill. The Bill, H.R. 8716, 65th Cong., 2d Sess. (1918), that was ultimately prepared and referred to a special House committee on water power contained most of the provisions of the bill that was finally enacted in 1920. The letter of transmittal accompanying certain amendments to the bill offered by the Secretaries reiterates many of the arguments that had been raised in favor of extensive federal water power regulation:

WASHINGTON, FEBRUARY 27, 1918.

Hon. T. W. Sims,
House of Representatives.

*Dear Mr. Sims:*

It is understood your committee will take action at an early date upon various proposals which have been made concerning water-power legislation. On account of

the conditions now affecting the power industry and the need of maintaining our entire industrial machinery at its highest efficiency, a satisfactory solution of the water-power problem is, in our judgment, one of the most important steps for the consideration of this Congress and one which should receive attention at the earliest possible date.

The industrial expansion which has been necessary in order to produce the materials and equipment needed in the prosecution of the war has placed unprecedented demands upon the electric power industry, to such an extent in fact that the output of commercial central stations has increased more than 60 per cent since 1914. This increase has been greatest in the manufacturing sections of the East where water-power development is comparatively limited, and has been chiefly in the form of steam-generated power, because steam power can be developed more quickly and at less capital cost than water power. This increase in power output has taken place notwithstanding advances in costs of construction and of operation.

*While the form of bill which has been presented for your consideration is directly concerned with water-power development only*, an adequate solution of this problem will have a favorable and stabilizing effect upon the whole power industry. Probably no considerable increase in new water-power development can be expected immediately, but legislation is urgently needed in order to put existing water-power developments, which have been made under inadequate law, into a position of security which will enable them to make extensions and to meet maturing obligations upon favorable terms.

There is also need of legislation in order that time may be given to prepare for the developments that must take place after the close of the war, if the United States is to maintain its proper place in world trade, or even to supply its domestic needs. A survey of water-power resources is needed, particularly with relation to

specific districts and specific industries. The various establishments of the Federal Government which have had to do with the administration of water power should be coordinated through a single agency, and as far as practicable all agencies, federal, state, and private, should be brought into cooperation. It is urgently recommended that a federal power commission be established as provided in the proposed bill and be given ample authority to undertake this work of preliminary investigations.

Beyond the need of power development as such is the need of increasing the proportion of water power in order to reduce the drain on our coal and petroleum supplies, particularly the latter. Even if the coal supply were unlimited, the reduction in the demands upon labor and transportation equipment would be sufficient reason for substituting water power for steam power whenever possible. The petroleum supply particularly in the West where the greatest proportion is used for fuel, is being rapidly depleted, consumption has exceeded production and stocks in storage are fast disappearing. With the substitution of water power for steam power in central stations and with the electrification of railroads, a large part of the use of petroleum for fuel could be eliminated.

Water-power legislation should have in view not only the maintenance of the rights of the public in the national resources, but also the adequate protection of private capital by which such resources are developed. The bill before you aims to do both.

. . .

Very truly yours,

NEWTON D. BAKER,
*Secretary of War.*

FRANKLIN K. LANE,
*Secretary of the Interior.*

D. F. HOUSTON,
*Secretary of Agriculture.*

[Footnote continued on page 32]

what was seen as the inadequacy of the nation's exploitation of its resources in preparation for the war, gave additional impetus to the drive for effective water power regulation,[62] and, after compromise between the houses

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[62] [Continued]
Quoted in Kerwin, *supra* note 34, at 225-28 (emphasis added). However, after a vigorous debate over its recapture provisions and a House-oriented reconciliation of the bill with the Shields Bill in a conference committee, H.R. Rep. 1147, 65th Cong., 3d Sess. (1919), it fell victim to a Senate filibuster as the 65th Congress closed on March 5, 1919. *See* Kerwin, *supra* note 34, at 217-55; *see also FPC v. Union Electric Co.*, 381 U.S. 90, 102 n.18 (1965).

The bill was reintroduced in the House at the start of the next session, and it passed the House with minor changes in July 1919.

[63] Secretary Houston, in his report to the House, stated:

> The exigencies of war brought to light defects in our national utilization of power which had not been fully realized. Operating under statutes enacted when the electrical industry was in its infancy, we had permitted our vast water-power resources to remain almost untouched, turning to coal and oil as the main source of power; for steam power could be developed more quickly and easily with fewer legal restrictions and with greater security to the investment. Probably not less than 85 percent of the power used in this country for domestic, public, and industrial purposes and for the operation of railroads is produced from coal and fuel oil. Not only are water powers relatively unused, but we are yet far from accomplishing the economies which are practicable in the development of steam power. While individual steam stations have reached a high degree of mechanical efficiency, we have failed to realize the group efficiency of many stations operating in a system and we still pursue the crude method of transporting steam power by rail in its raw state as fuel instead of transmitting it over wires in its developed state as electrical energy.

> The power requirements of this country will not be met until we develop our water powers, tie them in with steam plants located at the mine itself and operate all in great interstate systems. These considerations were presented before the special committee of the House of Representatives in the hearings held on the water-power bill during the last Congress. The need of adequate legislation is no less urgent now.
>
> H. R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919).

*See also* the remarks of Senator Jones introducing the bill:

> If 10 years ago, instead of enacting restrictive laws which have prohibited development of our water powers, Congress had invited their development through fair and reasonable terms, the beginning of the World War would have found the United States with 20,000,000 developed hydroelectric power instead of 5,000,000. Indeed, it is not too much to say that Germany would have hesitated before entering the conflict with probability of having to face a Nation possessing such an enormous amount of harnessed physical force wherewith to back up its armies. As it was, the beginning of the Great War found us short of coal, short of oil, short of power, and half a billion dollars was expended inside of two years in the erection of steam-power plants, many of which, built haphazard under war-time stress, are now useless owing to unfavorable location. Through failure of Congress to pass water-power laws under which money could be safely invested with prospect of a full return, water powers now wasting have been held back from development in at least 22 States of the Union.
>
> 59 Cong. Rec. 241 (1919)

There was also concern that the nation's river systems had proved inadequate to maintain wartime transportation burdens. *See* Fly, *supra* note 34, at 279. And, the old arguments about the efficiency and inexhaustibility of water power were also trotted out. *See* report of Secretary Houston, *supra*, and remarks of Senator Jones:

[Footnote continued on page 34]

on questions relating to the amount of Government charges and the wording of the recapture provision,"

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[63] [Continued]

The report of the Geological Survey shows that our consumption of coal for all purposes during the year 1913 was about 100,000,000 short tons, of which the railroads alone used about 30 percent. This tremendous tonnage requires for mining and transportation the labor of 1,500,000 men and the use of over 1,000,000 freight cars and 40,000 locomotives. In addition to this the petroleum used in 1913 was equivalent to 24,000,000 tons of coal. Every water horsepower now going to waste which could be economically substituted for fuel power would represent approximately 5½ tons of coal per year, based on an average of 12 hours per day. The labor of one man is released for other uses every time 50 hydroelectric horsepower is developed, and every 150 water horsepower developed releases one freight car for other duty.

* * * *

The utilization of even one-third of the enormous amount of energy latent but now wasting in our falling waters would make the United States the greatest manufacturing country of the world. The development of our water powers is intimately connected with the solution of such great national problems as the national defense; extension of inland waterways; shortage of food; conservation of coal, oil, and labor; irrigation of arid lands; and railroad car shortage. In addition to conserving vast quantities of coal and labor to mine and handle it, the hydroelectric energy existing in our running waters will, when developed, be utilized in the manufacture of explosives, fertilizers, wood pulp and paper, electrochemicals, copper and aluminum, and in other industrial applications.

59 Cong. Rec. 241-242 (1919)

[64] *See* H.R. Rep. 910, 66th Cong., 2d Sess. (1920); Kerwin, *supra* note 34, at 255-63.

the bill was passed by both houses and signed by President Wilson on June 11, 1920.

Thus was born the Federal Water Power Act of 1920, which "established firmly the principle of federal regulation of water power projects [and] . . . established a national policy in the use and development of water power on public lands and navigable streams." [45] The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power. Accordingly, as the Supreme Court has recognized, "the central purpose of the Federal Water Power Act was to provide for the comprehensive control over those uses of the Nation's water resources in which the Federal Government had a legitimate interest; these uses included navigation, irrigation, flood control, and, very prominently, hydroelectric power—uses which, while unregulated, might well be contradictory rather than harmonious. . . . The principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy." [46]

The Act itself, of course, was entitled the Federal Water Power Act; it could just as easily have been called the Federal Power Act (as it subsequently became),[47] or the Federal Water Resources Act, or some other name not indicating so specifically that the major use to be developed and regulated was the generation of hydroelectric power. The preface to the Act states:

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[45] Pinchot, *supra* note 34, at 19.

[46] *FPC v. Union Electric Co.*, 381 U.S. 90, 98-99 (1965); *see First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 180-81 (1946).

[47] *See* notes 83-86 *infra* and accompanying text.

> An Act to create a Federal Power Commission; to provide for the improvement of navigation; *the development of water power*; the use of the public lands in relation thereto, and to repeal section 18 of the River and Harbor Appropriation Act, approved August 8, 1917, and for other purposes.[68]

It is true, as petitioners point out, that statutory headings of complicated acts can provide no more than a very general guide and cannot limit the plain meaning of the statutory text.[69] But it does not follow that the regulation of steam plants can be subsumed under the words "and for other purposes" in the preface, which explicitly recites the broad, fundamental purposes of the Act.[70] We agree with intervenors that it is unlikely that, if Congress had intended to include the regulation of thermal-electric generation as a basic purpose of the Act, it would have limited reference in the preface to hydroelectric power—the lesser utilized of the two sources of electric power generation. The explicit reference to only hydroelectric power is consistent with the legislative history of concern with promoting the "comprehensive development of water power."[71]

Other provisions of the Act bear this out. For example, § 4(a), 16 U.S.C. § 797(a), authorizes the Commission to make investigations concerning the utilization of water resources of regions to be developed, concerning "the water-power industry and its relation to other industries and to interstate and foreign commerce," and concerning the location, capacity, development costs, and relation to markets of power sites—again, only water

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[68] 41 Stat. 1063 (emphasis added).

[69] *See Bhd. of R. Trainmen v. B. & O. Ry.*, 331 U.S. 519, 528-29 (1947).

[70] *See FPC v. Union Electric Co.*, 381 U.S. 90, 100-01 (1965).

[71] *FPC v. Union Electric Co.*, 381 U.S. 90, 101 (1965).

power is singled out for study. Section 10(a), *as amended*, 16 U.S.C. § 803(a), provided that licenses issued under the Act be issued on the condition that the projects adopted "shall be such as in the judgment of the commission will be best adapted to a comprehensive scheme of improvement and utilization for the purposes of navigation, *of water-power development*, and of other beneficial public uses . . . ." (Emphasis added.) The proviso to § 24, *as amended*, 16 U.S.C. § 818, accorded retroactive application to that section's provision for the protection of licenses in their utilization of public lands for which application had been made for use in constructing "water power" facilities.

In recognition of the intent of Congress as expressed in the Act, the newly created Commission in its first annual report determined that its licensing jurisdiction extended only to construction of water power projects. In two opinions contained in that report, the Commission determined that it did not have licensing jurisdiction over either the construction of a dam in tidal waters for the purpose of allowing bathing and boating "and to cover unsightly flats" or the stringing of transmission lines because neither project was connected with the development of water power.[12] Elsewhere in that report, the Commission described its licensing jurisdiction as follows:

> "On neither the public lands and reservations nor on the waters of the United States is the jurisdiction of the Federal Power Commission as broad as the jurisdiction of Congress. The latter has authority over all forms of use; *the Commission is limited to the consideration of projects designed to produce water power.* Structures or diversions having any other purpose, unless incidental to works constructed for power purposes or a necessary part of a com-

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[12] *See* FPC, *First Annual Report* 138, 155 (1921).

prehensive scheme of development, are not within the jurisdiction of the Commission." [73]

The Commission has adhered to this position consistently since 1921.[74]

We are told by petitioners, however, that this administrative interpretation of the Commission's jurisdiction is entitled to no weight because "consistent error is still error." [75] We are told that "the unadorned language of the Act" [76] is more significant than Commission interpretation; that administrative construction must yield to the "plain language and overall scheme" of the Act; [77] and that the jurisdictional judgment in this case does not require the kind of analysis of technical facts that would require us to defer to administrative expertise.

We have already indicated our disagreement with petitioners' argument that we need look no further than the language of §§ 3 and 4 of the Act to hold that the FPC has licensing jurisdiction over steam plants, and we discuss *infra* their contention that the purpose of the Act requires that we so hold even if the language does not.[78] Because the "unadorned language" of the Act, moreover,

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[73] *Id.* at 51-52 (emphasis added).

[74] *See, e.g.*, 1962 Annual Report of the FPC 12-13; 1966 *id.* at 8-9; 1 FPC, *National Power Survey* 100-01 (1964).

[75] *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672, 678 n.5 (1954); *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 206 n.12 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

[76] *Nantahala Power & Light Co. v. FPC*, 384 F.2d 200, 206 (4th Cir. 1967), *cert. denied*, 390 U.S. 945 (1968).

[77] *See, e.g., County of Marin v. United States*, 356 U.S. 412, 420 (1958); *United States v. New England Coal & Coke Co.*, 318 F.2d 138, 143 (1st Cir. 1963).

[78] *See* part II. B. *infra*.

does not compel the interpretation for which petitioners contend, consistent administrative construction to the contrary commands our respect; indeed, it is entitled to "great weight." [79] "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" [80]

It is not without significance, moreover, that this administrative interpretation was transmitted directly to Congress the year after passage of the Act, and that the only two significant amendments to the Act over the following fourteen years, including a reenactment of the Act in 1935, gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction.[81] In 1930, a Reorganization Act was enacted [82] to improve the functioning of the Commission by making it independent and able to employ its own full-time staff. In 1935 the Water Power Act was amended by Title II of the Public Utility Act of 1935 [83] and was made part I of the Federal Power Act. The 1935 Act

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[79] *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972).

[80] *Power Reactor Dev. Co. v. Electrical Workers*, 367 U.S. 396, 408 (1961); *see Udall v. Tallman*, 380 U.S. 1, 16 (1965); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958).

[81] *Cf. Pacific Power & Light Co. v. FPC*, 184 F.2d 272, 275 (D.C. Cir. 1950).

[82] 46 Stat. 797, codified in 16 U.S.C. §§ 792, 793, 797(d) (1970).

[83] 49 Stat. 838, *as amended*, 16 U.S.C. §§ 792-823 (1970). *See* DeVane, *Highlights of Legislative History of the Federal Power Act of 1935 and the Natural Gas Act of 1938*, 14 Geo. Wash. L. Rev. 30, 30-38 (1945).

added parts II[54] and III[55] to the Act to regulate the interstate transmission and sale of electricity. The deletion of the word "Water" from the title reflected the expanded duties of the Commission under parts II and III; the original Federal Water Power Act was virtually unchanged.[56] It would have been a simple matter for Congress to have rejected the Commission's construction of its licensing powers by adding clarifying amendments to § 4(e) or to § 3. By reenacting unchanged the material provisions of the Act with knowledge of the contemporaneous construction placed upon the Act by those charged with its administration, Congress can be said to have indicated its satisfaction with that construction.[57]

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[54] 49 Stat. 847, *as amended*, 16 U.S.C. §§ 824-824h (1970).

[55] 49 Stat. 854, *as amended*, 16 U.S.C. §§ 825-825u (1970).

[56] As the House report explained:

> The amendments to the present Federal Water Power Act are all minor. They have been requested by the Federal Power Commission, largely for the purpose of clarifying the act in its application to situations that have arisen in its administration, and also to strengthen it in certain particulars....

H.R. Rep. No. 1318, 74th Cong., 1st Sess. 7 (1935). The major changes were made in §§ 4 and 23 of the Act, relating to Commission licensing authority over hydroelectric projects on nonnavigable waters but affecting interstate commerce. *See FPC v. Union Electric Co.*, 381 U.S. 90 (1965); *First Iowa Hydro-Electric Cooperative v. FPC*, 328 U.S. 152, 172 n.17 (1946); Sen. Rep. No. 621, 74th Cong., 1st Sess. 43 (1935).

[57] *Cammarano v. United States*, 358 U.S. 498, 510-11 (1959); *FHA v. The Darlington, Inc.*, 358 U.S. 84, 90 (1958); *United States v. Wyoming*, 331 U.S. 440, 452-53 (1947); *cf. FPC v. Union Electric Co.*, 381 U.S. 90, 110-12 n.30 (1965); *id.* at 112 n.1 (Goldberg, J., dissenting). *But see Safe Harbor Water Power Co. v. FPC*, 124 F.2d 800, 808 (3d Cir.), *appeal dismissed*, 313 U.S. 546 (1941).

Consistent judicial interpretation also requires us to reject petitioners' argument that the Act extends the Commission's licensing jurisdiction to steam plants.

The Supreme Court's first significant discussion[87] of the history and purpose of the Federal Water Power Act occurred in 1946 in *First Iowa Hydro-Electric Cooperative v. Federal Power Commission*, 328 U.S. 152, in which the Court held that an applicant for a license under the Act did not have to obtain first a state permit and satisfy state requirements relating to the diversion of water from waterways determined to affect the commerce interests of the United States.[88] The Court observed that the Act, when read in the light of its legislative history, disclosed "a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation" by exercising its power over commerce and the public lands to foster the "development of the navigable waters of the United States."[89] The "greatest step" taken by the Government in pursuit of this goal was the provision in the Federal Water Power Act for 50-year licenses "for the development of water power in the navigable waters of the United States."[90] Citing approvingly an article by Gifford Pinchot,[91] one of the major figures in the conservationist movement,

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[87] The Court did consider several earlier cases involving various aspects of the Act. *See United States v. Appalachian Power Co.*, 311 U.S. 377 (1940); *Broad River Power Co. v. Query*, 288 U.S. 178 (1933); *Henry Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369 (1930); *New Jersey v. Sargent*, 269 U.S. 328 (1926).

[88] For application of this principle to water power projects on public lands, *see FPC v. Oregon*, 349 U.S. 435 (1955).

[89] 328 U.S. at 171-72.

[90] 328 U.S. at 172 n.17.

[91] Pinchot, *supra* note 34, at 19.

the Court briefly reviewed the history of the Act and characterized it as "distinctly an effort to provide federal control over and give federal encouragement to water power development."[52] The Court described the general purposes of the Act as follows:

> It was the outgrowth of a widely supported effort of the conservationists to secure enactment of a complete scheme of national regulation which would promote the comprehensive development of the water resources of the Nation, in so far as it was within the reach of the federal power to do so, instead of the piecemeal, restrictive, negative approach of the River and Harbor Acts and other federal laws previously enacted.
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> It was a major undertaking involving a major change of national policy. That it was the intention of Congress to secure a comprehensive development of national resources and not merely to prevent obstructions to navigation is apparent from the provisions of the Act . . . .[53]

Six years later, the Court held that the Commission's duty of conserving water power resources and of developing comprehensive plans for waterways justified the Commission's imposition of the condition that a licensee permit the United States to interconnect its transmission lines with those of the licensee for the transfer of power generated in plants owned by the Government.[54] That same Term the Court held that congressional approval of a general plan for development of a river system did not deprive the Commission of jurisdiction under the Federal Power Act to decide whether private construction might be preferable to public development of water power

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[52] 328 U.S. at 180 n.23.

[53] 328 U.S. at 180-81.

[54] *FPC v. Idaho Power Co.*, 344 U.S. 17, 22-24 (1952).

sites within the system."[96] In describing the scope of the Commission's authority, the Court said:

> Extensive review of the need for integration of federal activities affecting waterways . . . and of the breadth of authority granted to the Commission by Congress in response to the need is hardly necessary to establish the role of the Commission in hydroelectric power development. *See, e.g., First Iowa Coop. v. Power Comm'n*, 328 U.S. 152, 180, 181, and cases cited. From the time that the importance of power sites were brought to public and congressional consciousness during the administration of President Theodore Roosevelt, the significant development has been the devising of a general power policy instead of *ad hoc* action by Congress, with all the difficulties and dangers of local pressures and logrolling to which such action gave rise."[97]

In 1965, the most important, for our purposes, Supreme Court discussion of the language, history, and purpose of the Federal Water Power Act occurred in *FPC v. Union Electric Company*, 381 U.S. 90. In that case, the Court held that a license was required under the Act for the construction of a pumped-storage hydroelectric plant[98] that was to be located along a nonnavigable tributary of a navigable stream, would have no effect on the navigability of the main stream, but would generate electricity for interstate transmission. Congress,

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[96] *United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

[97] 345 U.S. at 167-68.

[98] A pumped-storage plant uses energy from other sources, usually steam plants, to pump water from a low pool or other water source to a higher pool during periods of low electricity demand. During peak periods, the water from the higher pool is released down into the lower pool, and the falling water generates electricity just as in conventional hydroelectric establishments. *See FPC v. Union Electric Co.*, 381 U.S. 90, 92 & n.3 (1965).

the Court stated, had intended to draw on its full power under the Commerce Clause and not merely its authority over navigable waters in making it unlawful in § 23(b), 16 U.S.C. § 817, to construct unlicensed project works that would affect "the interests of interstate or foreign commerce." After briefly reviewing the history of the Act, citing the *First Iowa* case, *supra*, and stating that the principal use to be regulated in the Act "was that of hydroelectric power to meet the needs of an expanding economy,"[99] the Court explained why hydroelectric plants situated on nonnavigable waters and generating electricity in interstate commerce were subject to the Act but steam plants located on navigable waters were not:

> The respondent asserts that an anomalous consequence flows from the Commission's construction of the Act and its view that steam plants generating large amounts of energy for interstate transmission are not within the scope of § 23(b), although located along a stream over which Congress has jurisdiction. Since the Commission's jurisdiction here rests solely on the interstate transmission of energy, there can be no basis for distinguishing between a steam plant and a hydroelectric facility both generating energy for interstate use. The Court of Appeals, after noting that the generation of electric energy is a local or intrastate activity, concluded from this argument that "[t]he Commission's jurisdiction . . . must logically rest upon its delegated congressional jurisdiction over the interests of commerce on navigable waters." 326 F. 2d, at 551. On this reasoning either the Act should, but does not, require a license for a steam plant when situated on the navigable mainstream itself, or should not, but does, require a license for a hydroelectric plant, pumped storage or otherwise, situated on the mainstream but which has no demonstrable effect, or a beneficial effect, on navigability. The answer to this conundrum is that unlike Part II of Title II of the Public Utility Act of 1935, under which the Commission regulates var-

[99] 381 U.S. at 99.

> ious aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission.[100]

The three dissenting Justices, disagreeing with the Court's broad reading of the commerce interests intended to be protected by the licensing provisions of the Act, did not believe that the "anomaly" created by exemption of steam plants on navigable waters could be so easily explained away:

> However, even in terms of the "power potential in water," I fail to find a relevant distinction between a plant which artificially pumps water to an elevated reservoir in off-peak periods allowing it to fall and generate electricity at peak periods and a plant which heats water to create steam which generates electricity. I see no purpose of the Act that justifies producing this anomaly in the regulatory scheme. Under my view, of course, when interstate or foreign commerce is affected, Congress can constitutionally require licenses of both steam and hydroelectric projects, of either steam or hydroelectric projects, or of neither. *The legislative history here, however, establishes to my satisfaction that it has required licenses of neither steam plants nor the type of hydroelectric plant here involved*, and in light of this legislative history I agree with the Court of Appeals that Congress intended that a license be required only where the interests of commerce on navigable waters are affected.[101]

Thus, all nine Justices agreed that the FPC had no licensing jurisdiction over steam plants; they disagreed

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[100] 381 U.S. at 109-10 (footnotes omitted).

[101] 381 U.S. at 114-15 (Goldberg, J., dissenting) (footnote omitted) (emphasis added).

about the inference to be drawn from this for purposes of determining Commission jurisdiction over water power plants on nonnavigable waters.[102] It may well be, as petitioners contend, that this obiter dictum in the *Taum Sauk* case constituted an unsupported assumption for purposes of argument, that nonadversary determinations do not have the force of law,[103] and that the Court did not have before it the figures cited *supra*[104] indicating the tremendous impact modern steam plants have on the flow and thereby the power potential in the waterways on which they are located. It is significant, however, that the entire Court was in agreement that neither the language nor the history of the Act required the conclusion that the Act was intended to afford the FPC jurisdiction over steam plants. At the least, the dictum in the majority opinion and the statement in the dissent emphasize the weakness of petitioners' argument that the "unadorned language" of § 4(e) is alone sufficient to preclude resort to extrinsic aids and to require reversal of the dismissal order of the FPC.

The lower federal courts, with the exception of the Eighth Circuit in the *Taum Sauk* case[105] have not squarely faced the question presented by this case. Moreover, we have found no case in which a court, by dictum or otherwise, has suggested that the Federal Water Act

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[102] The Eighth Circuit agreed with the dissenting Justices in the *Union Electric* case that the Act was not intended to cover steam plants and therefore should not be read to include hydroelectric plants on nonnavigable waters. *Union Electric Co. v. FPC*, 326 F.2d 535, 550-51 (8th Cir. 1964).

[103] *See, e.g., Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 290 (1946); *SEC v. Sterling Precision Corp.*, 393 F.2d 214, 220 (2d Cir. 1968).

[104] *See* notes 19-20 & 27 *supra* and accompanying text.

[105] *See* note 102 *supra*.

contemplated the licensing of steam plants. Those courts (including this court) that have touched on the question at all appear to have assumed that the Act applied to only hydroelectric facilities.[106] The same can be said with respect to commentators,[107] although Willard Gatchell, the former general counsel to the FPC, was of the opinion that § 4(e) could have been read by the Commission to authorize the licensing of steam plants.[108]

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[106] *See, e.g., Montana Power Co. v. FPC*, 298 F.2d 335, 339 (D.C. Cir. 1962); *Pacific Power & Light Co. v. FPC*, 184 F.2d 272, 274 (D.C. Cir. 1950); *Safe Harbor Water Power Corp. v. FPC*, 124 F.2d 800, 806 (3d Cir.), *appeal dismissed*, 313 U.S. 546 (1941); *Clarion River Power Co. v. Smith*, 59 F.2d 861 (D.C. Cir.), *cert. denied*, 287 U.S. 639 (1932); *Appalachian Electric Power Co. v. Smith*, 4 F. Supp. 6, 24 (W.D. Va.), *rev'd on other grounds*, 67 F.2d 451 (4th Cir.), *cert. denied*, 291 U.S. 674 (1933); *Alabama Power Co. v. Gulf Power Co.*, 283 F. 606 (M.D. Ala. 1922).

[107] *See* Kerwin, *supra* note 34, *passim*; LeBoeuf, *An Industry Appraisal of Federal Regulation of Electric Utilities under the Federal Power Act*, 14 Geo. Wash. L. Rev. 174, 190-93 (1945); Pinchot, *supra* note 34, *passim*; Ramey & Murray, *supra* note 13, at 35 & n.47; Schwartz, *Niagara Mohawk v. FPC: Have Private Water Rights Been Destroyed by the Federal Power Act?*, 102 U. Pa. L. Rev. 31, 36 (1953); Shields, *supra* note 54, at 143, 149; Smith, *supra* note 14, at 173; Starr, *supra* note 35, at 180; Tarlock, Tippy & Francis, *supra* note 13, at 514; Comment, *supra* note 13, at 99-100.

[108] Gatchell, *Jurisdictional Problems Under the Federal Water Power Act of 1920*, 14 Geo. Wash. L. Rev. 42, 44 (1945):

> Under this grant of authority, the Commission could issue a license for a steam-electric power plant located on a navigable stream, which utilized the water of such stream for condensing purposes and transmitted the power so generated across, along, or from such stream. Also, a power development utilizing steam rather than

With all respect to Mr. Gatchell, we believe, as shown above, that this overly literal reading of § 4(e) ignores the history and other language of the Act, and it is, of course, at odds with the overwhelming weight of authority.

B.

Similarly, we reject petitioners' contention that technological advances in the 53 years since the Act was passed have wrought such dramatic changes in the operation of steam plants that we should hold that the licensing of such plants by the FPC is consistent with, and indeed essential to, the purpose of the Act.

It is true, as petitioners point out, that recent developments in the technology of thermal-electric power generation have made possible the construction of generating units that dwarf the plants in use as recently as thirteen years ago.[102] An example is the Four Corners plants

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water power as the generating force could well have most of the physical structures listed in Section 3(11) of the statute in the definition of "project." Thus, there is no express limitation of the licensing authority to hydroelectric power plants as distinguished from steam-electric plants. Apparently the legislators considered the title to the Act (". . . to provide . . . for the development of water power . . .") as sufficient to exclude steam-electric plants. The Commission has justified such confidence by never claiming authority to license steam plants, stating in its First Annual Report that it was limited to consideration of projects designed to produce water power.[10]

[102] In 1 FPC, *National Power Survey* 14 (1964), the following table appears.

[Footnote continued on page 49]

involved in this litigation. The tremendous growth in the demand for electricity has resulted in an enormous expansion of the installed thermal-electric capacity [110] and a corresponding increase in the amount of water need for cooling.[111] Giant complexes such as the Four

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[109] [Continued]

Maximum Sizes of Generating Units in the United States

(In megawatts—1 megawatt equals 1,000 kilowatts or 1,000,000 watts)

| | Maximum turbine Rating—MW |
|---|---|
| 1900 | 1.5 |
| 1920 | 60 |
| 1930 | [1] 208 |
| 1940 | [1] 208 |
| 1950 | [1] 208 |
| 1956 | 260 |
| 1958 | 335 |
| 1960 | 450 |
| 1963 | 650 |
| 1965 | [2] 1,000 |

[1] Represents a single unit. More typically, maximum prevailing sizes were 75 mw in 1930, 100 mw in 1940, and 175 mw in 1950.

[2] Under construction.

[110] Petitioners point out that in 1920, the total generating capacity of all steam plants in the United States was 8,900 megawatts, Edison Electric Institute, *Historical Statistics of the Electric Utility Industry* 4 (Pub. No. 62-69, 1969); by 1971, total installed capacity of conventional steam plants was 298,345 megawatts, Edison Electric Institute, *Statistical Year Book of the Electric Utility Industry for 1971*, at 6-7 (No. 39, Pub. No. 72-25, Oct. 1972).

[111] The 120 billion gallons a day needed by 1971, *see* note 20 *supra* and accompanying text, is an increase over an esti-

Corners plant will withdraw (often permanently) such large amounts of water [112] that the "power potential" of majority waterways will be affected adversely to an extent greater than that of hydroelectric facilities. Thus, private power interests, petitioners argue, have succeeded in appropriating the power potential in public waters just as their predecessors did in the first part of this century when they built at will upon public lands and in navigable waters. The Supreme Court, it is argued, was not apprised in the *Taum Sauk* case of the extent of water consumption of modern steam plants and the resulting impact on our water resources.

In view of these developments, petitioners argue, FPC licensing jurisdiction should be expanded to effectuate the regulatory scheme envisioned by Congress when it enacted the Federal Water Power Act. The Act was intended to close the regulatory gap [113] created by piecemeal legislation that had served very narrow interests in the comprehensive management of water resources. Accordingly, it must be read to comprehend the regulation of steam plants so that the congressional purpose of promoting orderly development will not be frustrated.

Finally, petitioners argue that an "independent federal agency responsible for regulating a particular industry is given a broad mandate to do all things neces-

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mated 178 million gallons of cooling water needed on a daily basis in 1920. This latter figure is the product of 8,900 megawatts (*see* note 110 *supra*) by 20, which represents the number of gallons per kilowatt per day utilized by inefficient steam plants. *See* Staff of Joint Congressional Comm. on Economics, 91st Cong., 2d Sess., *The Economy, Energy, and the Environment* 99 (Comm. Print 1970).

[112] *See* note 27 *supra* and accompanying text.

[113] *Cf. Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954).

sary to implement its mandate." [114] This implied "necessary and proper" power encompasses the power of an agency to take account of technological developments that render existing regulatory practices obsolete,[115] and to adjust its operations to govern specific evils not named within its enabling act but clearly anticipated by a flexible statutory command.[116] The Federal Water Power Act, as amended, has given the FPC a "flexible mandate . . . to regulate the interstate electric power industry" and "to institute comprehensive planning for the nation's waterways," [117] and to this end it is necessary that the Commission license and regulate modern-day steam plants, which "threaten to resurrect the evil that regulation was supposed to thwart." [118]

The argument, despite its undeniable appeal, nevertheless, fails. Our natural reluctance to reject explicit language of the Supreme Court—language which, albeit obiter dictum, commanded unanimous agreement of the Justices—is reinforced by several factors. First, of course, the FPC does not have a broad, abstract mandate either to regulate the electric power industry or to engage in comprehensive planning for the utilization of our major waterways. In contrast, the Federal Communications Commission has "broad responsibilities for the orderly development of an appropriate system of local television broadcasting," [119] responsibilities derived from the "uni-

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[114] Petitioners' brief at 42.

[115] *See, e.g., United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[116] *See, e.g., American Trucking Ass'n v. United States*, 344 U.S. 298 (1953).

[117] Petitioners' brief at 44, 45.

[118] Petitioners' reply brief at 24.

[119] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968).

fied and comprehensive regulatory system for the [broadcasting] industry" established by the Communications Act of 1934, 47 U.S.C. § 151 et seq. (1970).[120] The Federal Water Power Act of 1920 was intended to promote the comprehensive development of the Nation's water resources in the context of regulating hydroelectric power; "the comprehensive development of water power . . . was the central thrust of the Act . . . ."[121] It could not be seriously contended, for example, that § 4(e) of the Act empowered the FPC to license the improvement of a tributary of a navigable river for purposes of navigation or flood control or irrigation in the absence of the development of power from the project.[122] Similarly, although under the holding of the *Taum Sauk* case, the FPC can license hydroelectric plants on nonnavigable waters if the plants transmit their power in interstate commerce, the agency was not authorized to regulate generally the interstate transmission and sale of electricity by nonlicensees until the Act was amended in 1935.[123] The 1920 Act thus did not direct the FPC to

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[120] *Id.* at 168.

[121] *FPC v. Union Electric Co.*, 381 U.S. 90, 101 (1965).

[122] Indeed, the literal language of § 4(e) precludes such a contention. Under that section, the Commission can license project works "necessary or convenient for the development and improvement of navigation *and* for the development, transmission, and utilization of power . . . ." (Emphasis added.)

[123] *See, e.g., United States v. Public Utilities Comm'n of Calif.*, 345 U.S. 295 (1953). It is interesting to observe that in the California PUC case, the Court, in rejecting the argument that the regulatory jurisdiction conferred on the FPC by the 1935 amendments did not include jurisdiction over the transmission of electricity by companies licensed under the 1920 Act, appeared to assume that only hydroelectric projects could be licensed: "not once is [the rate authority granted to the agency by the 1935 amendments] spoken of as one con-

regulate broadly the Nation's electric power industry or its major waterways, and we cannot conclude that recognizing Commission jurisdiction over steam plants is essential to fulfillment of the agency's congressional mandate.

Second, we agree that modern steam plants are of a size and efficiency unknown at the time of the passage of the Federal Water Power Act, that they use correspondingly more water for cooling purposes, and that the earlier plants returned most of their cooling waters to the water source instead of evaporating it. Still most of the electric power produced in this country at the time the Act was passed was generated by water-cooled steam plants.[124] Thus, any legislation intended to regulate comprehensively the interrelationship between the production of power and the efficient management of water resources would surely have taken account of the existence of these water-using steam plants. Congress' failure to do so refutes the argument that the FPC should regard steam plants as an unspecified or unanticipated method of operation whose regulation should now be undertaken as an obvious part of the congressional scheme. Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness.

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ditioned on the electricity concerned having been produced by steam generators or at unlicensed dams." 345 U.S. at 308.

[124] In 1920, of the approximately 50 billion kilowatt hours of electricity generated in the United States, about 70% was produced by steam power. Edison Electric Institute, *Statistical Year Book of the Electric Utility Industry for 1971*, at 17 (No. 39, Pub. No. 72-25, Oct. 1972); 1 FPC, *National Power Survey* 63 (1964). Although petitioners concede that most steam plants in 1920 were water-cooled, instead of air-cooled, they point to the insignificant water use of those plants compared with the use of modern plants. *See* notes 110-11 *supra*.

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The limits of this part of petitioners' argument may well have been reached in the *Taum Sauk* case and other cases[125] in which it was recognized that the FPC is empowered to license pumped-storage plants, which utilize fossil fuel to pump water into reservoirs and then permit the water to fall to generate power during peak periods. The majority of the Court in the *Taum Sauk* case thought the distinction between steam plants and pumped-storage plants, in terms of the "power potential in water," an "obvious" and "meaningful" one; and, although three justices disagreed, it is interesting to observe that the dissent thought the relevant comparison to be between the pumped-storage plant's utilization of fossil fuel to elevate water for storage purposes and the steam plant's utilization of fossil fuel to heat water for generating purposes.[127] If the "power potential in water" is not involved when water is heated to drive a turbine, there would appear to be less warrant to conclude that it is involved when water is used in the post-generation, cooling process.[128] And there would be no

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[125] *See, e.g., Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied, sub. nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conf.*, 384 U.S. 941 (1966). *On remand*, 44 F.P.L. 350 (1970), *aff'd*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972).

[126] 381 U.S. at 110.

[127] 381 U.S. at 115 (Goldberg, J., dissenting).

[128] We are aware, as petitioners point out, that the use of cooling waters is necessary to increase the efficiency of the generating process:

> This cooling process is a matter not of convenience but of economic necessity. As the steam is exhausted into the condenser and cooled by the water, it condenses to liquid, thus occupying a smaller space than it did formerly and producing a partial vacuum. This vacuum at the exhaust of the turbine permits the entering high-pressure steam to undergo greater expansion, and hence deliver

warrant to conclude that the mere extraction of water, with a consequent decrease in the amount of water available to downstream users for power generation, utilizes the "power potential in water" in a manner impinging on the FPC's licensing jurisdiction.

We are not unsympathetic to petitioners' position. It is somewhat anomalous that the FPC exercises stringent controls over the construction and operation of the great majority of the nation's hydroelectric installations,[129] not operated by federal agencies, but at the same time has no comparable authority with respect to non-hydroelectric installations which in 1971 generated over 80% of the electricity produced in the United States,[130] and utilized large quantities of water in doing so. In this

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more energy to the turbine rotor, than if it expanded only to the pressure of the atmosphere. Roughly, the over-all efficiency of producing useful work from high-pressure steam can be in the 40 to 50 per cent range if the exhaust steam is condensed by use of cooling water, whereas it will be only 30 to 40 per cent if the turbine exhaust is directly to the atmosphere . . . .

P. Cootner & O. Lof, *Water Demand for Steam Electric Generation* 8-9 (1965).

[129] As of 1964, the FPC had licensed about 76% of the conventional, nonfederal hydroelectric capacity of the United States. 1 FPC, *National Power Survey* 101 (1964).

[130] Edison Electric Institute, *Statistical Year Book of the Electric Utility Industry for 1971*, at 2, 18-19 (No. 39, Pub. No. 72-25, Oct. 1972), gives the following figures for 1971:

| | |
|---|---|
| Total electric power generation (kwh in millions) | 1,612,936 |
| Hydro | 266,320 |
| Conventional Steam | 1,303,465 |
| Nuclear Steam | 37,899 |
| Internal Combustion | 6,252 |

age of pervasive federal regulation and of heightened awareness of environmental considerations, it is difficult to comprehend that there should be no federal agency or policy governing the siting and operation of fossil-fueled steam plants. One looks in vain through an array of state and federal legislation for a unified, comprehensive regulatory scheme governing power plant siting.[131] Apart from the Federal Power Act and the Atomic Energy Act, 42 U.S.C. §§ 2011-296 (1970),[132] regulating the construction and operation of hydroelectric plants and nuclear-powered steam plants by the FPC and the Atomic Energy Commission, respectively, federal controls over various aspects of electric power plants are exercised under such diverse legislation as the Rivers and Harbors Act, 33 U.S.C. § 403 (1970), which requires a federal permit to obstruct or modify the course of navigable waters; the Federal Water Pollution Control Act, *as amended*, 33 U.S.C. §§ 1251-376 (Supp. II, 1971-72), which, *inter alia*, provides for the establishment of effluent limitations for navigable waters; the Air Quality Act of 1967, *as amended*, 42 U.S.C. §§ 1857-57*l* (1970), which, *inter alia*, establishes national ambient air quality standards for several pollutants; and provisions requiring federal approval for the leasing of Indian lands for the construction of power plants, 25 U.S.C. § 635 (1970), and for the location of transmission lines and rights of way

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[131] The siting problem is discussed in Journey, *Power Plant Siting—A Road Map of the Problem*, 43 Notre Dame Law. 273 (1972); Ramey & Murray, *supra* note 13; Smith, *supra* note 14; Tarlock, Tippy & Francis, *supra* note 13; Comment, *supra* note 13.

[132] For discussion of the role of the AEC in power plant construction and operation, *see Calvert Cliffs' Coordinating Comm., Inc. v. United States AEC*, 449 F.2d 1109 (D.C. Cir. 1971); Journey, *supra* note 131, at 281; Smith, *supra* note 14, at 172-73; Tarlock, Tippy & Francis, *supra* note 13, at 523-29, 533-39.

across Indian lands, 25 U.S.C. § 323 (1970), national parks, 16 U.S.C. § 5 (1970), or national forests, 16 U.S.C. § 522 (1970).[129] Under the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 et seq. (1970), the decisions made by federal officers must include consideration of environmental factors and must be accompanied by the completion of certain procedural steps including the filing of environmental impact statements.[130] In addition, there may be federal legislation peculiarly applicable to the operations of particular power plants, such as the extensive regulation of withdrawals of water from the Colorado River system.[131] But there is no comprehensive federal legislation governing the

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[129] For discussion of these various statutes and their relationship to power plant siting, see Tarlock, Tippy & Francis, *supra* note 13, at 515-39; Comment, *supra* note 13, at 84-92; Comment, *supra* note 28, at 708-11, 712-15.

[130] *See, e.g., Environmental Defense Fund v. TVA*, 468 F.2d 1164, 1173-76 (6th Cir. 1972); *Calvert Cliffs' Coordinating Comm., Inc. v. United States AEC*, 449 F.2d 1109, 1112-15 (D.C. Cir. 1971); Tarlock, Tippy & Francis, *supra* note 13, at 533-39; Comment, *supra* note 28, at 709-10.

[131] The Colorado River is apportioned between the Upper and Lower Basin states by the Colorado River Compact, *see* 70 Cong. Rec. 324 (1928), and among the states within the basin by the Upper Basin Compact, 63 Stat. 31 (1949), and the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u (1970). *See Arizona v. California*, 373 U.S. 546 (1963). In times of shortage, the Secretary of the Interior has authority to allocate the waters among the states and among the users of each state. *See Arizona v. California*, *supra*, 373 U.S. at 579-90. Other federal controls over the flow of the river are provided by the Mexican Water Treaty, T.S. 994, 59 Stat. 1219; the Colorado River Storage Project Act, 43 U.S.C. §§ 620-620o (1970); and the Colorado River Basin Project Act, 43 U.S.C. §§ 1501-56 (1970). For a history and discussion of the Colorado River legislation, see H.R. Rep. No. 1312, 90th Cong., 2d Sess. (1968), in 3 U.S. Code Cong. & Ad. News 3666 (1968).

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siting or operations of fossil-fueled power plants. Regulation such as it is,[126] is piecemeal and fortuitous. And, federal regulation is complicated by the existence of numerous state commissions having varied responsibilities for plant siting.[127]

It may be, as petitioners argue, that the FPC is the logical agency to design and implement a national siting policy. The Commission has had over 50 years of experience licensing hydroelectric facilities, and since 1935 has engaged in extensive supervision of bulk power suppliers. The Commission is developing an expertise, accelerated by several important judicial decisions,[128] in dealing with environmental problems arising in connection with the construction of power facilities. Indeed, the Commission agrees that it should be the primary

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[126] *See* Comment, *supra* note 28.

[127] For discussion of state regulation of plant siting, see Tarlock, Tippy & Francis, *supra* note 13, at 539-53; Comment, *supra* note 28, at 711-17. A table of state siting laws is contained in Journey, *supra* note 131, app. B.

[128] *See Udall v. FPC*, 387 U.S. 428 (1967); *Greene County Planning Bd. v. FPC*, 455 F.2d 412 (2d Cir.), *cert. denied*, 409 U.S. 849 (1972); *Scenic Hudson Preservation Conf. v. FPC*, 354 F.2d 608 (2d Cir. 1965), *cert. denied sub nom. Consolidated Edison Co. v. Scenic Hudson Preservation Conf.*, 384 U.S. 941 (1966), *on remand*, 44 F.P.C. 350 (1970), *aff'd*, 453 F.2d 463 (2d Cir. 1971), *cert. denied*, 407 U.S. 926 (1972); *Pacific Gas & Electric Co.*, 44 F.P.C. 198 (1970); *Arkansas Power & Light Co.*, 40 F.P.C. 522 (1968); *Susquehanna Power Co.*, 32 F.P.C. 826 (1964); *Minnesota Power & Light Co.*, 32 F.P.C. 1497; *PUD No. 1 of Skamania County, Wash.*, 32 F.P.C. 444 (1964); *Puget Sound Power & Light Co.*, 28 F.P.C. 718 (1962); *Citizens Utilities Co.*, 21 F.P.C. 455 (1959); *Namekagon Hydro Co.*, 12 F.P.C. 203 (1953), *aff'd sub. nom. Namekagon Hydro Co. v. FPC*, 216 F.2d 509 (7th Cir. 1954). *See generally* Tarlock, Tippy & Francis, *supra* note 13, at 515-20; Note, *Of Birds, Bees, and the FPC*, 77 Yale L.J. 117 (1967).

certifying agency for plant siting. Its Chairman has advocated such authority[149] on many occasions and the agency has supported several bills introduced in Congress in the past decade providing for federal control over the construction and operation of fossil-fueled power plants and related facilities.[150]

Notwithstanding the foregoing, and quite apart from the practical problems of implementation and administration of the extensive licensing authority that petitioners would have us bestow upon the FPC,[151] adoption of the

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[149] *See* Hearings on H.R. 5277 and Related Bills Before the Subcomm. on Communications of the Senate Comm. on Interstate Commerce, 92d Cong., 1st Sess., pt. 2, at 426-27 (1971) (testimony of FPC Chairman Nassikas); Nassikas, *Coordination of Electric Power and Environmental Policy*, 4 Nat. Res. Law. 268 (1971).

[150] In its 1962 and 1966 annual reports, the Commission recommended that the Federal Power Act be amended to give it licensing jurisdiction over diversion facilities of steam plants. *See 1962 Annual Report of the FPC* 12-13; *1966 Annual Report of the FPC* 8-9. Among the bills introduced in Congress over the past few years that the Commission has favored are H.R. 12535, 91st Cong., 1st Sess. (1969); S. 4121, 91st Cong. 2d Sess. (1970); H.R. 6971, 92d Cong., 1st Sess. (1971); H.R. 5277, 92d Cong., 1st Sess. (1971). For description and analysis of the major siting proposals of recent years, see Journey, *supra* note 121, at 284-302; Ramey & Murray, *supra* note 13, at 38-43; Smith, *supra* note 14, at 182-95; Tarlock, Tippy & Francis, *supra* note 13, at 553-67.

[151] *Cf.* the problems encountered by the FPC in attempting to regulate the sales of natural gas by local producers to interstate pipeline companies after the decision in *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954); the Court later referred to these attempts as "the outstanding examples in the federal government of the breakdown of the administrative process." *Permian Basin Area Rate Cases*, 390 U.S. 747, 758 (1968).

Power plant siting is an extraordinarily complex process requiring the integration of many different factors. *See* au-

position they assert would accomplish by judicial fiat what Congress has refused or neglected to accomplish when it enacted and later amended the Federal Water Power Act. We are restricted to the statute as written by the Congress, illuminated by legislative history, and construed by the Supreme Court. It is not our function either "to rewrite a statute so that it will authorize what [we think] should be authorized" [112] or to "write into an act of Congress a provision which Congress affirmatively omitted." [113] These canons would be violated if we were to order the FPC to assert jurisdiction over fossil-fueled steam plants. The arguments made by petitioners would be better addressed to the Congress, which has not yet decided to provide explicitly for federal regulation of power plant siting.

III.

In addition to the nonfederal construction and operation of hydroelectric project works, § 4(e) empowers the FPC to issue licenses "for the purpose of utilizing the surplus water or water power from any Government dam . . . ." Petitioners contend that two of the Four Corners plants—Navajo and Kaiparowitz—will withdraw water directly from impoundments created by a Government dam, and that the other four plants are

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thorities cited in note 131 *supra*. FPC Chairman Nassikas has indicated that any effective legislative scheme for plant siting should provide for a transitional period to assure continuity of bulk power supply and the financing of projects already in the planning stages. *See* Hearings on Powerplant Siting and Environmental Protection Before the Subcomm. on Communications and Power of the House Comm. on Interstate and Foreign Commerce, 92d Cong., 1st Sess. 26-27 (1971).

[112] *Story v. Snyder*, 181 F.2d 154, 159 (D.C. Cir.), *cert. denied*, 340 U.S. 866 (1950).

[113] *Border Pipe Line Co. v. FPC*, 171 F.2d 149, 152 (D.C. Cir. 1948).

downstream from Government dams and will have water available on a dependable basis only because of the "stream regimen imposed by upstream government dams." [114] According to petitioners, these are usages of "surplus water" that invoke Commission jurisdiction under § 4(e) and require the Commission to regulate the operations of the Four Corners plants. We agree that § 4(e) empowers the FPC to license the use of surplus water by steam plants, and accordingly we remand to the Commission for consideration of petitioners' "surplus water" claim."[115]

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[114] Petitioners' brief at 9.

[115] Although intervenors contend otherwise, the Commission in its brief to us concedes that, with respect to the Navajo and Kaiparowitz plants, petitioners preserved their "surplus water" argument in their application for rehearing as required by § 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b) (1970), as a precondition to our consideration of the claim. Intervenors and respondent assert, however, that neither the complaint nor the rehearing application raised the question of the applicability of the "surplus water" clause to the four plants not withdrawing water directly from Government impoundments, and they contend that we may not consider the claim as it relates to those plants. In the posture of this case, and in view of our resolution of the "surplus water" issue, it makes little difference whether we agree with this contention; petitioners can simply file an amended complaint setting forth the downstream claim, and the FPC will consider it in the first instance just as it will consider the primary "surplus water" claim. Further, we think that intervenors' and respondent's position is not well taken. The policy of § 313(b) of affording an agency the opportunity to consider and determine a question, *see, e.g., FPC v. Colorado Interstate Gas Co.*, 348 U.S. 492, 499 (1954), was clearly satisfied because Commission rejection (by silence) of the primary "surplus water" claim obviously amounted to a rejection of the secondary claim. And, because petitioners could file an amended complaint raising the secondary claim, the issue would be before us at a future date. Accordingly, the exhaustion requirement of § 313(b) would be inapplicable in this case.

As they do with respect to their broader claim under § 4(e), petitioners rely on the literal language of the Act to support their contention that the FPC is empowered to license the operations of the Four Corners plants. Quite simply, they contend, the plants utilize "surplus water" from Government dams for purposes of generating power."[146] Petitioners accept the following definition of "surplus water" offered by the Commission in a case involving a hydroelectric project downstream from a Government dam:

> Where there is available stored water not to be used in irrigation, which represents storage over and above that needed for irrigation, and which would otherwise flow unused down the main channel of the stream, that water is "surplus water," and, if used for power development, would require a license from this Commission.[147]

Petitioners also point out that under the FPC's own determination, the surplus water need not be withdrawn directly from a Government impoundment in order to trigger FPC licensing jurisdiction:

> It . . . appears immaterial to the Commission's licensing authority under the "surplus water" clause of section 4(e), whether hydroelectric developments utilizing the surplus water from a Government dam are constructed at, or in the immediate vicinity, or several miles downstream from the Government dam. On the other hand, the Commission's licensing authority with respect to hydroelectric development utilizing "water power" from Government dams is limited by natural laws to those developments at or in the vicinity of such dams. The natural laws re-

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[146] Petitioners point out that the use of cooling water is a necessary part of the power generation process. *See* note 128 *supra*.

[147] *California Oregon Power Co.*, 13 F.P.C. 1, 4 (1954), *supplemental opinion*, 15 F.P.C. 14 (1956), *petition dismissed*, 239 F.2d 426 (D.C. Cir. 1956).

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lating to the use of "water power" are such that its utilization may only be at the dam when the power house is integral therewith, or at the downstream end of a pressure conduit leading from the intake to the turbines in the power house. Thus, the "water power" utilized at or in the vicinity of a dam is the result of the head and flow there available.

. . . [W]e have found nothing in the language of the act, or in its legislative history, which leads us to believe that the Commission's licensing authority under the "surplus water" clause of section 4(e) is limited to hydroelectric power projects located at or in the immediate vicinity of a Government dam.[18]

Accordingly, petitioners argue, giving the language of the "surplus water" clause its ordinary meaning, reading it disjunctively to the "constructing, operating, and maintaining" clause of § 4(e), and following the Commission's own definitions, all six Four Corners plants are utilizing "surplus water" within the intendment of the Federal Power Act.

Respondent Commission argues that Congress intended the Federal Water Power Act to apply only to water power projects, as indicated by the Act's legislative history, and that steam plants are not "project works" within the Commission's licensing authority. Intervenors contend that the "surplus water" provision applies only to hydroelectric plants utilizing surplus water or water power from Government dams.

We think that the Commission and intervenors construe the "surplus water" clause too narrowly. Initially, it should be observed that the "surplus water" clause does not refer to the licensing of "project works" as does the "constructing, operating, and maintaining" clause. The words "project works" in the latter clause

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[18] *California Oregon Power Co.*, 15 F.P.C. 14, 19 (1956), *petition dismissed*, 239 F.2d 425 (D.C. Cir. 1956).

follow the words "for the purpose of," and they are not found at all in the "surplus water" clause even though that clause is introduced by a second "for the purpose of." By their terms, then, the two licensing provisions of § 4(e) encompass different activities, and it does not follow that the limitation of the reach of the "constructing, operating, and maintaining" clause of hydroelectric projects requires reading a similar limitation into the language of the "surplus water" clause.

Second, unlike the situation with respect to the "constructing, operating, and maintaining" clause, there is little in the way of extrinsic illumination of the congressional purpose in enacting the "surplus water" clause. There is no judicial decision on its scope; the FPC decisions quoted above interpret the clause in the context of proposed hydroelectric developments;[10] and there apparently is no useful legislative history. What little extrinsic assistance we have been able to piece together, however, tends to show that the language of the "surplus water" clause does indeed mean what it says.

In a line of cases extending back almost thirty years before the passage of the Federal Water Power Act, the Supreme Court confirmed the power of Congress to dispose of the water power inherent in waters over which Congress had jurisdiction, either by generating and selling the power itself or by permitting others to do so.

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[10] The Commission has in the past permitted its licensees to allow waters impounded by their reservoirs to be used for cooling purposes by steam plants, *e.g.*, *Arkansas Power & Light Co.*, 30 F.P.C. 522 (1963); *Duke Power Co.*, 36 F.P.C. 675 (1966), but it has refused in such cases to construe its licensing authority to extend to the operations of the steam plants utilizing the waters, *e.g.*, *Brazos River Authority*, 34 F.P.C. 1507, 1509 (1965). Of course, these decisions involved the "constructing, operating, and maintaining" clause, not the "surplus water" clause.

The basic principle was established in the first *Green Bay* case, *Kaukauna Water Power Company v. Green Bay and Mississippi Canal Company*, 142 U.S. 254 (1891), in which the Court recognized that a state could, consistent with its power to condemn property for a public purpose, reserve for itself for disposition as it saw fit the water power created by the erection of a dam under state auspices for purposes of improving navigation. The Court reasoned that

> if, in the erection of a public dam for a recognized public purpose, there is necessarily produced a surplus of water, which may properly be used for manufacturing purposes, there is no sound reason why the State may not retain to itself the power of controlling or disposing of such water as an incident of its right to make such improvement. Indeed, it might become very necessary to retain the disposition of it in its own hands, in order to preserve at all times a sufficient supply for the purposes of navigation. . . . As there is no need of the surplus running to waste, there was nothing objectionable in permitting the State to let out the use of it to private parties, and thus reimburse itself for the expenses of the improvement.[150]

Seven years later, the Court applied this principle in the second *Green Bay* case, *Green Bay and Mississippi Canal Company v. Patten Paper Company*, 172 U.S. 58 (1893), *rehearing denied*, 173 U.S. 179 (1899), to uphold the right of a grantee of the United States to lease the surplus water power from Government navigation works to other private parties, against a claim by certain riparian owners that they were entitled under state law to an equal apportionment of the water flow and hence of the water power inherent in the river. Describing the case as one involving "water power incidental to the construction and maintenance of a public

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[150] 142 U.S. at 273.

work and, from the nature of the case, subject to the control of the public authorities, in this instance the United States," [151] the Court relied heavily on the first *Green Bay* case to hold that the grantee's right to the water power created by the works was superior to the riparian rights recognized under state law:

> . . . [I]t is . . . plain that the mode and extent of the use and enjoyment of [the water power and appurtenant property] by the Canal Company fall within the sole control of the United States. At what points in the dam and canal the water for power may be withdrawn, and the quantity which can be treated as surplus with due regard to navigation, must be determined by the authority which owns and controls that navigation. In such matters there can be no divided empire.[152]

It was but a short step to the decision in *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913), in which the Court rejected the argument that a federal condemnation of certain riparian property for purposes of improving navigation did not amount to a taking for a public purpose because a section of the condemnation act authorized the Secretary of War to sell the surplus water power after the Government had made the navigation improvements. The Court considered the question largely settled by the decision of the first *Green Bay* case that "[i]f the primary purpose is legitimate, we can see no sound objection to leasing any excess of power over the needs of the Government." [153] The Government, in a word, could become a water power entrepreneur once it had constructed a dam for a legitimate public purpose.

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[151] 172 U.S. at 76.

[152] 172 U.S. at 80.

[153] 229 U.S. at 73.

However, the "development of our rivers by no means kept pace with the scope of congressional power as defined by the Supreme Court decisions." [154] Congress was slow to appreciate the value of multiple-purpose waterway projects, in particular the tremendous value, from both a pecuniary and a functional standpoint, of the water power within its control. There were a few exceptions. An early act allowed the Secretary of War to lease the water power at a federal arsenal to a private water power company on condition that the company complete the development of the power and maintain it at its own expense.[155] Another early act authorized projects combining irrigation and flood control.[156] In addition, several appropriations bills contained provisions permitting the leasing of the use of the water power of certain navigable waterways, limited to the use of surplus water not required for navigation, with the stipulation that the interests of navigation remain paramount.[157] But, in the Reclamation Act of 1902,[158] under which the Government became involved in the large-scale construction of irrigation works on the public lands in the West, no provision was made for the disposition of water power created by the reclamation dams.

During Theodore Roosevelt's administration, however, a number of significant developments occurred. In 1906, the Reclamation Act was amended to allow the Secretary of the Interior to lease surplus water power:

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[154] Fly, *supra* note 34, at 279.

[155] Act of March 3, 1879, ch. 182, 20 Stat. 377, 387.

[156] 25 Stat. 505, 526 (1888); *see* Fly, *supra* note 34, at 287.

[157] Act of August 11, 1888, ch. 860, 25 Stat. 400, 417; Act of September 19, 1890, ch. 907, 26 Stat. 426, 447; Act of June 28, 1902, ch. 1299, 32 Stat. 408, 409.

[158] 32 Stat. 388, *as amended*, 43 U.S.C. §§ 371 et seq. (1970).

> Whenever a development of power is necessary for the irrigation of lands . . . or an opportunity is afforded for the development of power under any [reclamation] project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege . . . . *Provided*, That no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project . . . .[159]

After this amendment, the Government became involved in the business of generating hydroelectric power, primarily because of the works constructed for pumping purposes at reclamation projects,[160] and the principle of sale of surplus water power was introduced to Government projects bearing no necessary relation to navigation. President Roosevelt, in his several vetoes of power site bills and his appointments of commissions such as the Inland Waterways Commission,[161] made clear that the development of water power should be used by the Government to defray the cost of waterway improvement, and that efficient water resource management required the integration of many water uses in single projects.[162] Condemnation acts such as that involved in the *Chandler-Dunbar* case, *supra*, began to incorporate provisions authorizing the Government to develop water power for its own use or lease at Government projects intended primarily to accomplish other purposes.

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[159] Act of April 16, 1906, ch. 1631, § 5, 34 Stat. 117, *as amended*, 43 U.S.C. § 522 (1970).

[160] *See Burley Irrigation Dist. v. Ickes*, 116 F.2d 529, 530-32 (D.C. Cir. 1940), *cert. denied*, 312 U.S. 687 (1941); 1 FPC, *National Power Survey* 100 (1964).

[161] *See* note 49 *supra*.

[162] *See* Fly, *supra* note 31, at 290.

In the second decade of this century, the soundness of President Roosevelt's position on water resource development became increasingly recognized. Legislative developments included the 1910 amendment to the General Dam Act,[163] and another amendment to the Reclamation Act, which provided that surplus storage and carrying capacity developed in a particular reclamation project could be utilized on a contractual basis by other distributors of irrigation waters.[164] A Senate subcommittee report issued in 1912 declared:

> If, for the purpose of improving the navigability of a stream carrying interstate commerce, the Federal Government constructs and maintains a dam, with locks and gates, the Government has the undoubted right to establish and maintain, in connection with such dam, an electric-power plant for the purpose of furnishing motive power to operate such locks and gates. And the Federal Government has the right to sell, lease, or rent, for compensation, any surplus power that may arise from and be an incident to such an improvement of navigation.[165]

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[163] *See* note 49 *supra* and accompanying text.

[164] Act of February 21, 1911, ch. 141, 36 Stat. 925, codified in 43 U.S.C. §§ 523-25 (1970).

[165] 48 Cong. Rec. 11,568, 11,571 (1912), subsequently published as Sen. Doc. No. 246, 64th Cong., 1st Sess. 17 (1916), quoted in Fly, *supra* note 31, at 290. One year after the decision in *United States v. Chandler-Dunbar Water Power Company*, 229 U.S. 53 (1913), the Adamson Bill, H.R. 16053, 63d Cong., 2d Sess. (1914), was introduced in Congress as the first of the bills leading to the enactment of the Federal Water Power Act. It contained a provision authorizing the leasing of surplus power developed by Government water power plants. *See* Kerwin, *supra* note 31, at 176. In 1916, Senator Newlands attempted to amend the Shields Bill to provide an appropriation for developing multiple-purpose waterway projects and formulating plans for comprehensive development of the major river system. *See* 53 Cong. Rec. 3733-36 (1916); Fly, *supra* note 34, at 292; Kerwin, *supra* note 31, at 205-16.

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In 1917, a rivers and harbors appropriation act created a Waterways Commission to coordinate the various bureaus and commissions of the United States with responsibility for water resources, to investigate questions relating to the improvement and control of navigation with respect to all watersheds in the United States, and to include

> therein the related questions of irrigation, drainage, forestry, arid and swamp land reclamation, clarification of streams, regulation of flow, control of floods, utilization of water power, prevention of soil erosion and waste, storage, and conservation of water for agricultural, industrial, municipal, and domestic uses, cooperation of railways and waterways, and promotion of terminal and transfer facilities, to secure the necessary data, and to formulate and report to Congress, as early as practicable, a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purpose of navigation and for every useful purpose.[166]

The Act of 1917 was explicitly repealed by the Act of 1920,[167] and the newly created Federal Power Commission took over the planning and coordination responsibilities of the Waterways Commission,[168] which included consideration of a spectrum of water uses not related to water power.

The Federal Water Power Act of 1920 thus represents the culmination of many different pressures. Technological advances made it imperative that huge water-

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[166] Act of August 8, 1917, ch. 49, 40 Stat. 250, 269. *See* Starr, *supra* note 35, at 180; Walker & Cox, *Jurisdiction of the Federal Power Commission over Non-Power Water Uses*, 5 Land & Water L. Rev. 65, 73-74 (1970).

[167] Act of June 10, 1920, ch. 285, § 29, 41 Stat. 1077.

[168] *See, e.g.*, 16 U.S.C. § 797(a) (1970).

works be designed to perform several functions."[169] The federal government was becoming more involved in the construction of major water projects, and American entry into World War I precipitated projects such as the provision of water power for the munitions complex built during World War I on the Tennessee River near Muscle Shoals, Alabama.[170] The water resources, including the inherent water power, controlled by the Government were increasingly seen as a valuable asset to be exploited in a way that would benefit the public by insuring the self-sufficiency of projects and maximum use of public resources.

Accordingly, the Federal Water Power Act undertook to regulate the nonfederal exploitation of the nation's water power resources and the disposition of excess federally controlled water or water power. Section 4(e) assures maximum utilization of water resources for navigation, water power, and other beneficial uses by providing for the licensing, in accordance with § 10(a), 16 U.S.C. § 803(a),[171] of nonfederal construction and operation of water power projects on navigable waters, public

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[169] *See* Fly, *supra* note 34, at 287-88.

[170] *See Ashwander v. TVA*, 297 U.S. 288 (1936).

[171] 16 U.S.C. § 803(a) (1970) provides:

> All licenses issued under sections 792, 793, 795-813, and 820-823 of this title shall be on the following conditions:
>
> (a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval.

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lands, or reservations, and for the licensing of the nonfederal use either of water impounded by a Government dam in excess of the amount needed to accomplish the purpose of the dam *or* of actual hydroelectricity generated by a Government dam and not required for governmental purposes.

We are persuaded that the "surplus water" provision was intended to serve broader interests than the "constructing, operating, and maintaining" clause, which was intended only to regulate nonfederal hydroelectric projects. It reflects an explicit concern with utilizing water resources to defray the cost of waterway improvements as well as a concern with comprehensive water resource management. It empowers the FPC to license the use of either "surplus water" or "water power" from *any* Government dam, and thus is not limited to the mere leasing of excess Government water power. It is interesting to observe that three months before the Act was finally passed, Congress amended the Reclamation Act to authorize the Secretary of Interior "to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper . . . ." [12] Since Congress was obviously concerned with maximizing the public benefit from Government waterworks, the inference arises that the addition of the words "surplus water" in § 4(d) of the Federal Water Power Act was intended to afford the FPC a broad licensing authority over federally controlled waters comparable to that afforded the Secretary of Interior in reclamation projects. The FPC could license either the use of "water power" —*i.e.*, electricity actually generated by the Government —or the use of "surplus water" for the private generation of water power or other purposes. This would obvi-

[12] Act of February 25, 1920, ch. 86, 41 Stat. 451, codified in 43 U.S.C. § 521 (1970).

ate the previous necessity of providing in specific acts relating to specific projects, that surplus water could be leased for power purposes and would also take account of the expanding governmental involvement in water resource use and development.

This interpretation, which gives effect to the literal language of § 4(e), is strengthened, somewhat paradoxically, by developments subsequent to the passage of the Federal Water Power Act that diluted Commission authority. In 1928, Congress passed the Boulder Canyon Project Act, 43 U.S.C. §§ 617-617u (1970), which authorized the first federal large-scale multiple-purpose project on a major waterway. The Act authorized the construction of what ultimately became Hoover Dam and other works, for purposes of flood control, navigation, and reclamation, and for generating electricity to make the project self-sufficient financially.[123] The Secretary of the Interior was empowered to contract for the storage and delivery of water "for irrigation and domestic uses, and generation of electrical energy and delivery at the switchboard to States, municipal corporations, political subdivisions, and private corporations of electrical energy generated at said dam, upon charges that will provide revenue which . . . will in his judgment cover all expenses of operation and maintenance incurred by the United States on account of works constructed under" the Act.[124] Under 43 U.S.C. § 617e, the Secretary of the Interior is authorized to lease units of any Government power plant of the project, with the right to generate electricity, and to lease "the use of water for the generation of electrical energy," in conformity with the requirements of the Federal Power Act and the rules and regulations of the Federal Power Commission. These provisions, although

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[123] *See* 43 U.S.C. §§ 617, 617e (1970).

[124] 43 U.S.C. § 617d (1970).

seemingly ousting the FPC of direct authority over the surplus water and water power of what would be a "Government dam" under the Federal Power Act, indicate the breadth of congressional concern with federal management of federal property to promote efficient water resource utilization. In 1933, the Tennessee Valley Authority was created to undertake duties in the Tennessee River basin comparable to those of the Secretary of Interior under the Boulder Canyon Project Act.[175] Under 16 U.S.C. § 831i, the T.V.A. is given the authority to sell the surplus power generated by it and not needed in its own operations.[176] Under the 1936 and 1944 Flood Control Acts, the Department of the Army is empowered to build and control dams and other improvements for purposes of flood control and navigation. 33 U.S.C. §§ 701 et seq. (1970). The Secretary of the Army is empowered to contract with states, municipalities, private concerns, and individuals "for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army . . . ."[177]

Acts such as these obviously cut into FPC authority to regulate the utilization of surplus water or power, and it is apparent that in every case involving a contention of the applicability of the "surplus water" clause, the FPC will have to consider the interrelationship of its enabling act and the scope of the authority of the Government agency responsible for the particular Government dam.[178] But it is also apparent that Congress has for a long time been concerned with the controlled dis-

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[175] Act of May 18, 1933, ch. 32, 48 Stat. 58, *as amended*, 16 U.S.C. §§ 831-831dd (1970).

[176] *See Ashwander v. TVA*, 297 U.S. 288 (1936).

[177] 33 U.S.C. § 708.

[178] *Cf. United States ex rel. Chapman v. FPC*, 345 U.S. 153 (1953).

position of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency. We believe the "surplus water" provision of the Federal Power Act to be but an early manifestation of that concern. At a minimum, Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricty is ultimately produced.[179]

Accordingly, we hold that the Commission erred in dismissing petitioners' complaint, and we remand to the Commission to consider the surplus water claim. We do not decide whether the FPC does have jurisdiction over the four plants alleged to be the beneficiaries of Government surplus water by virtue of their being downstream from Government dams because we have no record on which to base such a determination.[180] We hold only that the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants, and we leave to the Commission to determine in the first instance whether the plants involved in this appeal fall within the category asserted by petitioners. In determining this question, the Commission should also consider whether any jurisdiction it might have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency.

Remanded to the Federal Power Commission for further proceedings not inconsistent with this opinion.

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[179] It has been argued that the "surplus water" clause empowers the FPC to license nonpower uses of surplus federally controlled water. *See* Walker & Cox, *supra* note 166, at 70-75.

[180] *Cf. California Oregon Power Co. v. FPC*, 239 F.2d 426, 432 (D.C. Cir. 1956).

# APPENDIX B

## United States Court of Appeals

FOR THE [illegible] CIRCUIT

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No. [illegible] September Term, 19[illegible]

The Chemehuevi Tribe of Indians, et al,
Petitioners

v.

Federal Power Commission, Respondent

Arizona Public Service Company, San Diego Gas & Electric Company, Utah Power & Light Company, Department of Water & Power of the City of Los Angeles, El Paso Electric Company, Imperial Irrigation District, Salt River Project Agricultural Improvement & Power District, Southern California Edison Company, Pacific Gas & Electric Company, Intervenors

Petition for Review of Orders of the Federal Power Commission

Before: [illegible], Tamm and MacKinnon,* Circuit Judges

FILED [illegible] 1973

HUGH [illegible] KLINE

JUDGMENT

This [illegible] on to be heard on a petition for review of orders of the Federal Power Commission and was argued by counsel. On consideration of the foregoing, it is

ORDERED AND ADJUDGED by this Court that this [illegible] be hereby [illegible] that the Federal Power Commission, for [illegible] proceedings, and in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

[illegible]
Clerk

Dated: [illegible], 1973

* Sitting by designation pursuant to [illegible] . . . § 291(a).

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# APPENDIX C

## United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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**No.** 71-2012 **September Term, 1973**

The Chemehuevi Tribe of Indians,
et al.,
Petitioners

v.

Federal Power Commission,
Respondent

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Arizona Public Service Company
San Diego Gas & Electric Company
Utah Power & Light Company
Department of Water and Power of the City of L.A.
El Paso Electric Company
Nevada Power Company
Salt River Project Agricultural Improvement &
Power District
Southern California Edison Company
Tucson Gas & Electric Company, Intervenors

Before: Wright and Tamm, Circuit Judges; and McCree*, United States Circuit Judge for the Sixth Circuit

ORDER

On consideration of Intervenors' Arizona Public Service Company, El Paso Electric Company, Nevada Power Company, Salt River Project Agricultural Improvement and Power District, San Diego Gas & Electric Company, Southern California Edison Company, Tucson Gas & Electric Company, and Utah Power & Light Company, petition for rehearing, it is

ORDERED by the Court that Intervenors' aforesaid petition for rehearing is denied.

Per Curiam
For the Court:

Hugh B. Cline
Clerk

*Sitting by designation pursuant to 28 U.S.C. §291(a).

# APPENDIX D

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
John A. Carver, Jr., Albert B. Brooke, Jr.,
and Pinkney Walker.

The Chemehuevi Tribe of Indians, et al. )
v. ) Docket No. E-7664
Arizona Public Service Company, et al. )

ORDER DISMISSING COMPLAINT

(Issued November 4, 1971)

On September 10, 1971, The Chemehuevi Tribe of Indians, the Cocopah Tribe of Indians, the Sierra Club, the Committee to Save Black Mesa, Inc., Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay (complainants) filed a complaint and petition for order to show cause pursuant to 18 C.F.R. § 1.6, requesting the Commission to determine a ". . . single legal issue: does the Federal Power Commission have licensing jurisdiction over steam plants generating and transmitting energy in interstate commerce, which withdraw large quantities of water from navigable streams for cooling and other plant purposes?" (complaint, para. 19). The complaint seeks to invoke licensing jurisdiction of this Commission granted pursuant to Part I of the Federal Power Act, 16 U.S.C. 792-823 (complaint, paras. 7-9).

The Commission may, at any stage of a proceeding, make a determination of its jurisdiction and may do so on its own motion as well as upon request of the parties. All of

the parties cited as "complainees" by complainants have not responded to the complaint 1/. The issue of jurisdiction is clear and warrants disposition of this matter upon the complainants' pleadings without the necessity of further answers or briefing. The complaint must be dismissed.

The authority of this Commission to license facilities under Part I of the Federal Power Act is that of licensing project works. Lake Ontario Land Development & Beach Protection Ass'n v. Federal Power Commission, 212 F.2d 227, 232 (CADC, 1954), cert. denied, 347 U.S. 1015 (1954). They are defined in the Act, 16 U.S.C. § 796(12), as the physical structures of a project. Project is defined as follows, 16 U.S.C. § 796(11):

> "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system, or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;

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1/ The Secretary, by notice dated October 19, 1971, extended the time within which to respond to the complaint, to on or before November 9, 1971. The cited respondents include Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, Salt River Project, Tucson Gas and Electric Company, El Paso Electric Company, Los Angeles Department of Water & Power, Nevada Power Company, Utah Power & Light Company, and San Diego Gas & Electric Company.

The thermal electric generating stations referred to in the complaint 2/, are not properly classifiable as project works within the meaning of Part I of the Federal Power Act, which was originally enacted as the Federal Water Power Act, approved June 10, 1920 (41 Stat. 1063). By Title II of the Public Utility Act of 1935 (49 Stat. 838), the original Federal Water Power Act, with certain clarifying amendments, was made Part I of the Federal Power Act. The preamble of the Federal Water Power Act (41 Stat. 1063), specifies that one of the purposes of that legislation was to provide for the development of water power. Steam power is not mentioned. Moreover, the legislative history shows that it was not intended that the licensing of thermal stations be included.

This construction of the Commission's licensing jurisdiction under Part I of the Federal Power Act has been the long-standing interpretation of the Commission. See First Annual Report of the Federal Power Commission, pp. 51-52 (1921); Forty-Fourth Annual Report of the Federal Power Commission, pp. 10-11 (1964); and Forty-Fifth Annual Report of the Federal Power Commission, p. 159 (1965). It has been recognized favorably by the Supreme Court. See Federal Power Commission v. Union Electric Co., 381 U.S. 90, 110 (1965).

The Commission further finds:

The Commission is without jurisdiction to grant the substantive licensing relief requested by complainants in their complaint and petition.

The Commission orders:

Complainants' complaint and petition, filed September 10, 1971, is dismissed for lack of Commission jurisdiction.

By the Commission.

( S E A L )

Kenneth F. Plumb,
Secretary.

---

2/ Four Corners plant, Mohave plant, Navajo plant, San Juan plant, Huntington Canyon plant, and Kaiparowits plant.

# APPENDIX E

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: John N. Nassikas, Chairman;
John A. Carver, Jr., Albert B. Brooke, Jr.,
Pinkney Walker, and Rush Moody, Jr.

The Chemehuevi Tribe of Indians, et al. )
v. ) Docket No. E-7664
Arizona Public Service Company, et al. )

ORDER DENYING APPLICATION FOR REHEARING

(Issued December 10, 1971)

On November 12, 1971, application for rehearing of an order dismissing complaint issued November 4, 1971, was filed by the Chemehuevi Tribe of Indians, the Cocopah Tribe of Indians, the Sierra Club, the Committee to Save Black Mesa, Inc., Emma Yazzie, Jimm Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay (Complainants).

The respondents are Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, Salt River Project, Tucson Gas and Electric Company, El Paso Electric Company, Los Angeles Department of Water & Power, Nevada Power Company, Utah Power & Light Company, and San Diego Gas and Electric Company.

The Commission finds:

The application for rehearing filed by Complainants presents no new facts or principles of law which were not fully considered by the Commission in its order of November 4, 1971, or which, having now been considered warrant any modification of that order.

The Commission orders:

The application for rehearing filed by Complainants on November 12, 1971, is denied.

By the Commission.

( S E A L )

Kenneth F. Plumb,
Secretary.

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Supreme Court, U. S.
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AUG 23 1974
MICHAEL RODAK, JR., CLERK

Nos. 73-1380, 73-1666, and 73-1667

# In the Supreme Court of the United States

OCTOBER TERM, 1974

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.,
PETITIONERS
*v.*
FEDERAL POWER COMMISSION

ARIZONA PUBLIC SERVICE COMPANY, ET AL.,
PETITIONERS
*v.*
THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

FEDERAL POWER COMMISSION, PETITIONER
*v.*
THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## BRIEF FOR THE FEDERAL POWER COMMISSION

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# In the Supreme Court of the United States

OCTOBER TERM, 1974

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No. 73-1380

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL., PETITIONERS

*v.*

FEDERAL POWER COMMISSION

---

No. 73-1666

ARIZONA PUBLIC SERVICE COMPANY, ET AL., PETITIONERS

*v.*

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

---

No. 73-1667

FEDERAL POWER COMMISSION, PETITIONER

*v.*

THE CHEMEHUEVI TRIBE OF INDIANS, ET AL.

---

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE FEDERAL POWER COMMISSION

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### OPINIONS BELOW

The opinion of the court of appeals (A. 38a-112a) is reported at 489 F.2d 1207. The principal order of

the Federal Power Commission (A. 22a–24a) and its order denying rehearing (A. 28a) are reported at 46 FPC 1126 and 46 FPC 1307, respectively.

## JURISDICTION

The judgment of the court of appeals (A. 36a–37a) was entered on November 9, 1973. Timely petitions for rehearing by the Federal Power Commission and Arizona Public Service Company, *et al.*, were denied on December 7, 1973 (A. 141a–143a). A petition for clarification by the Chemehuevi Tribe of Indians, *et al.*, was denied on December 11, 1973 (A. 144a).

On February 28, 1974, and March 28, 1974, the Chief Justice extended the Federal Power Commission's time for filing a petition for a writ of certiorari to and including May 6, 1974, and the Commission's petition was filed on that date. On February 27, 1974, and April 3, 1974, Mr. Justice Douglas and the Chief Justice, respectively, extended the time of Arizona Public Service Company, *et al.*, for filing a petition for a writ of certiorari to and including May 6, 1974, and the petition of those parties was filed on that date. The petition for a writ of certiorari of the Chemehuevi Tribe of Indians, *et al.*, was filed on March 11, 1974.

All three petitions were granted and the cases were ordered consolidated on June 10, 1974 (A. 146a).

The jursidiction of this Court rests on 28 U.S.C. 1254(1) and Section 313(b) of the Federal Power

Act, as added, 49 Stat. 860, as amended, 16 U.S.C. 825*l*(b).[1]

## QUESTIONS PRESENTED

1. Whether thermal-electric generating plants that draw cooling waters from navigable streams are "project works" subject to the Federal Power Commission's licensing jurisdiction under Section 4(e) of the Federal Power Act, as amended, 16 U.S.C. 797(e).

2. Whether, under Section 4(e) of the Act, the Federal Power Commission has jurisdiction to license the use by thermal-electric generating plants of "surplus water * * * from any Government dam."

## STATUTES INVOLVED

Sections 3(10), 3(11), 3(12), 4(e), and 23(b) of the Federal Power Act, as amended, 16 U.S.C. 796(10), 796(11), 796(12), 797(e), and 817 are set forth in the Appendix to this brief, *infra*, pp. 61–64.

## STATEMENT

Hydroelectric generating plants use water power—the energy of falling water—to generate electric

[1] In order to facilitate an orderly presentation of the issues in the consolidated cases, the parties agreed upon the following briefing arrangement. The Solicitor General and counsel for Arizona Public Service Company, *et al.*, will each file a single opening brief addressing the issues in all the cases. Counsel for the Chemehuevi Tribe of Indians, *et al.*, will file a single responsive brief also addressing the issues in all cases. The Solicitor General and counsel for Arizona Public Service Company, *et al.*, will each have an opportunity to file a reply brief.

power. Thermal-electric or steam plants generate electricity through the use of steam energy produced by heat from the burning of fossil fuels or from nuclear energy. The steam, at high pressure and temperature, is passed through a turbine, which drives a generator that produces the electricity. Thermal-electric plants use substantial quantities of water to cool and condense the steam after it has passed through the turbines.

Since 1921, the Federal Power Commission has taken the position that its licensing jurisdiction under Part I of the Federal Power Act, as amended, 16 U.S.C. 791a-823,[2] applies only to non-federal hydroelectric generating plants.

1. The present case arose on a complaint (A. 1a–17a) filed with the Commission by two Indian tribes, five individual Indians, and two environmental groups,[3] seeking an order requiring the owners of six present and planned fossil-fueled steam-electric generating plants to apply for licenses to construct and operate those plans. The complaint asserted (A. 5a–6a) that the Commission has Part I licensing jurisdiction over the plants under Section 4(e) of the Act,

[2] Part I of the Federal Power Act was originally enacted as the Federal Water Power Act, approved June 10, 1920 (41 Stat. 1077). By Title II of the Public Utility Act of 1935 (49 Stat. 838), the original Federal Water Power Act, with certain clarifying amendments, was made Part I of the Federal Power Act.

[3] The Chemehuevi Tribe of Indians, the Cocopah Tribe of Indians, Emma Yazzie, Jimmy Yazzie, Paul Begay, Chester Hugh Benally, and Bill Begay, the Sierra Club, the Committee to Save Black Mesa. We refer to these parties as the Complainants.

as amended, 16 U.S.C. 797(e),[4] because all six plants are "project works" for the development, transmission, and utilization of power across, along, and in navigable waters, and because two of the plants will use "surplus water" from a "Government dam."

The six thermal-electric generating plants to which the complaint was directed are owned jointly by ten public utilities,[5] and are located in the Four Corners area of New Mexico, Arizona, Utah, and Colorado. The plants use or will use waters of the Colorado River system in their boilers and for cooling purposes, but none obtains any water from a project licensed by the Commission.[6]

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[4] Section 4(e) empowers the Commission to issue licenses to citizens, corporations, and state and municipal agencies "for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient * * * for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam * * *."

[5] Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, Salt River Project, Tucson Gas and Electric Company, El Paso Electric Company, Los Angeles Department of Water and Power, Nevada Power Company, Utah Power & Light Company, and San Diego Gas & Electric Company.

[6] The Mohave Plant is located on patented land in Clark County, Nevada. It has two 750,000 kilowatt coal-fired steam generating units. Cooling water for the plant is withdrawn from the mainstream of the Colorado River downstream from the Davis Dam, pursuant to a contract between the Secretary of the Interior and the Colorado River Commission and a con-

The complaint alleged that the plants were being constructed, operated, and maintained without licenses or permits required under Part I of the Act

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tract between the River Commission and one of the plant owners.

The Four Corners Plant is located on the Navajo Indian Reservation near Farmington, New Mexico. It has five coal-fired steam generating units with a combined capacity of approximately 2,087 megawatts. The plant's water is taken from the natural flow of the San Juan River downstream from Navajo Dam. The water is obtained under a permit issued by the New Mexico State Engineer.

The San Juan Plant is located on patented land near Farmington, New Mexico. It is operating one coal-fired steam generating unit with a nominal rating of 330,000 kilowatts. As many as three other such units may be added. Water is obtained from the San Juan River downstream from Navajo Dam pursuant to a contract between the Secretary of the Interior and one of the owners of the plant.

The Huntington Plant is located primarily on state and patented land in Huntington Canyon, Utah. It has one 430,000 kilowatt coal-fired steam generating unit. Two units of comparable size are planned. The plant's water is obtained from private companies who have appropriated the water under Utah law from Huntington Creek. The Secretary of the Interior has also contracted with the plant's owner to provide water from Joe's Valley Reservoir on Huntington Creek. No water has yet been delivered under the latter contract.

The Navajo Plant is located on the Navajo Indian Reservation near Page, Arizona. It has three coal-fired steam generating units rated at 770,000 kilowatts each. The plant's water is withdrawn from Lake Powell, the reservoir created by Glen Canyon Dam, pursuant to a contract between the Secretary of the Interior and the owners of the plant.

The Kaiparowits Plant, which is still in the planning stages, will be a coal-fired generating plant with a capacity of 2,000 megawatts. It will be located in southern Utah near Lake Powell, the proposed source of the plant's water. Water is to be provided pursuant to a contract between the United States Bureau of Reclamation, Department of the Interior, and the owners.

(A. 6a).[7] It sought an order directing the owners of the plants "to show cause why they should not be required to apply for licenses" and "why they should not be required to suspend all development, planning and construction of the plants in question, pending the outcome of these proceedings" (A. 11a).

The Commission dismissed the complaint on the ground that it has no jurisdiction to license steam plants (A. 22a–24a). The Commission stated that "the legislative history [of the original Federal Water Power Act] shows that it was not intended that the licensing of thermal stations be included" (A. 24a). "This construction of the Commission's licensing jurisdiction under Part I of the Federal Power Act has been the long-standing interpretation of the Commission" and "has been recognized favorably by the Supreme Court" (*ibid.*).[8]

2. On the complainants' petition for review, the court of appeals sustained the Commission's determination in part. It held that thermal-electric plants are not "project works" under Section 4(e) and that the Commission therefore has no licensing jurisdiction over the plants under that clause (A. 53a–97a).

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[7] Section 23(b) of the Act, as amended, 16 U.S.C. 817, makes it unlawful, "for the purpose of developing electric power, to construct, operate, or maintain any dam, * * * or other works * * * along * * * any of the navigable waters of the United States, or upon any part of the public lands * * *, or utilize the surplus water or water power from any Government dam, except under * * * a license granted pursuant to this Act."

[8] The Commission cited *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 110.

The complainants' application for rehearing (A. 25a–27a) was thereafter denied (A. 28a).

The court traced in detail the legislative history and purpose of the Act and the consistent administrative and judicial interpretation since its enactment in 1920. It concluded that the Commission's licensing jurisdiction extends only to hydroelectric generating plants and that "[s]team plants were purposely omitted from the congressional scheme" (A. 90a).

The court also held, however, that the Commission's licensing authority under the "surplus water" clause is *not* limited to plants using such water to generate hydroelectric power but includes steam plants using "surplus water" for cooling purposes (A. 97a–112a). In the court's view, the "surplus water" clause, unlike the "project works" clause, "reflects an explicit concern with utilizing water resources to defray the cost of waterway improvements as well as a concern with comprehensive water resource management" (A. 109a). It "was intended to afford the FPC a broad licensing authority over federally controlled waters" (*ibid.*).

The court did not attempt to define "surplus water" and did not decide whether the six plants involved in this case are within the Commission's licensing jurisdiction under that clause. It held, however, "that the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants," and it remanded the case to the Commission "to determine in the first instance whether the plants involved in this appeal fall within the category asserted by petitioners" (A. 112a). The court specified that, "[i]n determining this question, the Commission should also consider whether any jurisdiction it might

have under the Federal Power Act is affected in any way by the jurisdiction of any other federal agency" (*ibid.*).[9]

## ARGUMENT

### THE FEDERAL POWER COMMISSION HAS NO JURISDICTION UNDER PART I OF THE FEDERAL POWER ACT TO LICENSE EITHER THE CONSTRUCTION AND OPERATION OF THERMAL-ELECTRIC GENERATING PLANTS OR THE USE BY SUCH PLANTS OF SURPLUS WATER FROM A GOVERNMENT DAM

#### A. INTRODUCTION AND SUMMARY

1. The court of appeals held that the Commission does not have licensing jurisdiction over thermal-electric plants under the "project works" clause of Section 4(e) of the Act, but that it does have licensing jurisdiction over such plants under that Section's "surplus water" clause. We submit that the decision is correct with respect to "project works" but incorrect with respect to "surplus water."[10]

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[9] The court stated that some legislation enacted after Section 4(e) may have "diluted Commission authority" to manage federal water resources (A. 110a). The reclamation Acts, flood control Acts, and Tennessee Valley Authority legislation, for example, "obviously cut into FPC authority to regulate the utilization of surplus water of power" (A. 111a), because those Acts empower the Secretary of the Interior, the Secretary of the Army, and the TVA to dispose of any surplus water from dams they operate. Consequently, "it is apparent that in every case involving a contention of the applicability of the 'surplus water' clause, the FPC will have to consider the interrelationship of its enabling act and the scope of the authority of the Government agency responsibility for the particular Government dam" (*ibid.*).

[10] Although the issues in this case are framed in terms of the scope of the Commission's power under Section 4(e) to issue a license, it is actually Section 23(b), 16 U.S.C. 817 (set forth *infra*, pp. 63–64), that states the circumstances in which a person

This conclusion follows, in our view, from the court's own thorough analysis in the "project works" portion of its opinion—an analysis with which we generally agree and to which we have little to add. That section of the opinion demonstrates, by reference to the language of the statute, its legislative history and purpose, and its consistent administrative and judicial interpretation, that Part I of the Federal Power Act applies only to hydroelectric generating plants and not at all to thermal-electric generating plants.

In our view, the court's careful reasoning in the "project works" section of its opinion bears equally upon the proper interpretation of the "surplus water" clause. As we shall show, that reasoning rests upon the history, purpose, and consistent interpretation, not of the "project works" clause alone, but of the

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is required to invoke the Commission's authority by seeking to obtain a license. In our view, the two sections are harmonious, and the limits of the latter necessarily bear upon the scope of the former. The language of the sections does differ in some respects, however, as we point out below (*infra*, pp. 57–58), and, to the extent that those textual differences might be deemed significant, it is Section 23(b) rather than Section 4(e) that would control the determination of whether the owners of a thermal-electric plant *must* obtain a license. Thus, even if the Commission had the power, contrary to our reading of Section 4(e), to issue a license to a steam plant at the request of the owners, that would not necessarily mean that the owners would be acting unlawfully if they failed to secure such a license. Since the complainants in this case sought an order to show cause why the owners of the plants "should not be required to apply for licenses" (A. 11a), the owners' obligations under Section 23(b), rather than the Commission's powers under Section 4(e), would be determinative in this case if there were a difference between them.

entire Act. Just as the court's analysis fully supports its conclusion on the "project works" clause, the same analysis persuasively undercuts its conclusion on the "surplus water" clause. In neither clause does the Act confer upon the Commission licensing jurisdiction with respect to thermal-electric plants.

2. The Act's original title (Federal Water Power Act), its preamble, the language of Section 4(e), the language of other sections, and the scheme of the Act reflect the overriding congressional purpose to further the development of water power projects for the generation of hydroelectric energy. The Act contains no reference to thermal-electric generation, even though that was and is by far the greater source of electric energy in this country.

The legislative history of the Act reveals that Congress was concerned exclusively with the development of water power and that steam power was purposely omitted from the legislative scheme. The bill that ultimately became the Federal Water Power Act was designed to meet "the need for legislation for the development of hydroelectric power" (H. Rep. No. 61, 66th Cong., 1st Sess., p. 4), and the licensing jurisdiction of the Federal Power Commission was therefore limited to water power projects.

Thus, in the first year of its existence, the Commission interpreted its own jurisdiction as "limited to the consideration of projects designed to produce water power" (1921 Annual Report, pp. 51–52), and it held that it has no jurisdiction to license thermal-electric facilities (*id.* at 155–156). In the 53 years since then, the Commission has regularly reiterated,

both in its annual reports to Congress and in its formal adjudicatory decisions, the view that its "licensing jurisdiction under Part I of the Federal Power Act is limited to projects for the generation of hydroelectric power" (1962 Annual Report, p. 13). This consistent and contemporaneous construction of the Act by the agency charged with its administration is entitled to substantial weight.

This Court has clearly expressed its understanding that the Act applies only to hydroelectric facilities and not to steam-electric facilities. In *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 110, the Court stated that the Act "is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful * * *."

Although changes in steam plant technology have led to facilities with capacities much greater than those in existence in 1920 when the Act was passed, Congress was aware then that steam power was the primary source of electric energy and yet it deliberately omitted steam plants from the Commission's licensing jurisdiction. The Commission was not given a mandate to regulate the entire power industry, and the changed conditions do not justify an assertion of jurisdiction over an aspect of that industry that was deliberately excluded from regulation.

If, as complainants say, there are considerations of policy that now favor giving the Commission licensing jurisdiction over steam plants, those con-

siderations should be addressed to Congress, not the courts. The issue here is not what Congress *should do* but what it *did* in the Federal Power Act. It deliberately limited the Commission's licensing jurisdiction to water power projects. As a consequence, the existing statutory scheme is not designed for the regulation of the steam power industry and would not be adequate to guide the Commission's exercise of a licensing authority over that industry.

3. The extensive legislative history of the surplus water clause shows that it was not meant to be an exception to the Act's limitations. Like the rest of the Act's licensing provisions, it applies only to the use of water in the development of hydroelectric energy.

The phrase "surplus water or water power" in Section 4(e) has antecedents in several of the comprehensive water power bills that were considered by Congress during the six years before the Act was finally passed in 1920. In its early form, the clause would have authorized the Secretary of War to lease "the right *to develop power from the surplus water* over and above that required for navigation at any navigation dam" (H.R. 16053, 63d Cong., 2d Sess., § 14; emphasis added). Although the wording of the clause gradually evolved to its present form (giving the Commission authority to license the use of "the surplus water or water power from any Government dam"), its essential meaning was unchanged. The clause was always intended to regulate only the development of *water power* from water in excess of that required for government purposes at a dam.

The conclusion of the court of appeals that the clause reaches the use of such water for cooling purposes in a steam plant rests in part upon its erroneous impression that the Federal Power Commission inherited the broad planning and coordinating functions of the Waterways Commission. The legislative history demonstrates, however, that the water resource responsibilities of the Waterways Commission, whose members had never been appointed, were wholly investigatory and advisory. It had no regulatory or licensing functions. Moreover, Congress considered but rejected a provision that would have transferred those investigatory powers to the newly-created Federal Power Commission. In the end the Power Commission did not inherit the Waterways Commission's function with respect to uses of water for other than the development of water power.

Legislation enacted prior and subsequent to the Federal Water Power Act gives other agencies express authority to dispose of surplus water within their jurisdiction for purposes other than hydroelectric power development. Those statutes do not, however, support the court of appeals' reading of Section 4(e). To the contrary, they show that Congress knows how to confer jurisdiction over other uses of water when it determines to do so.

The Commission's interpretation of the surplus water clause does not render it meaningless. When Section 4(e) is read, as it must be, in connection with Section 23(b), it becomes clear that the surplus water clause has independent application and, in certain cir-

cumstances, could alone provide a basis for the Commission's exercise of licensing authority. Even in those situations where a hydroelectric plant using surplus water from a government dam would also have to be licensed under the project works clause, the surplus water clause could provide an alternative jurisdictional base or an additional licensing requirement.

B. THE LANGUAGE, HISTORY, AND PURPOSE OF THE ACT AND ITS CONSISTENT ADMINISTRATIVE AND JUDICIAL INTERPRETATION SHOW THAT THE COMMISSION'S LICENSING JURISDICTION IS LIMITED TO HYDROELECTRIC POWER PROJECTS

*1. The limited scope of the Act's licensing provisions is reflected in the statutory language and in the Act's original title and preamble.*

Statutory interpretation starts, of course, with the language to be interpreted. See *Flora* v. *United States*, 357 U.S. 63, 65. But that language "should not be read in isolation from the context of the whole Act" (*Richards* v. *United States*, 369 U.S. 1, 11). "[I]n fulfilling our responsibility in interpreting legislation, 'we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy'" (*ibid.*).

We recognize that the bare words of Section 4(e) of the Federal Power Act, as amended, 16 U.S.C. 797 (e), do not themselves conclusively limit that subsection's applicability to hydroelectric power plants. The words do, however, suggest that limited purpose, and the context in which they appear fortifies the suggestion.

Section 4(e) authorizes the Commission to issue licenses "for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient * * * for the development, transmission, and utilization of power across, along, from, or in any [waterways] * * * over which Congress has jurisdiction * * *, or upon any part of the public lands and reservations * * *, or for the purpose of utilizing the surplus water or water power from any Government dam * * *." The terms preceding the phrase "other project works"—"dams, water conduits, reservoirs, power houses, transmission lines"—particularly when conjoined, refer to structures that ordinarily are associated primarily with hydroelectric rather than thermal-electric power projects.[11]

That the limitation upon the reach of Section 4(e) is not plainer from the words of the subsection itself is understandable. Congress apparently assumed that the Act's limited scope was clear enough from its very title, as well as from its preamble and the language contained in other subsections. What is now Part I of the Federal Power Act was originally enacted in

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[11] The definition of "project" in 16 U.S.C. 796(11) similarly refers to features of hydroelectric facilities. A "project" is a "complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, * * * and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use or occupancy of which are necessary or appropriate in the maintenance and operation of such unit * * *."

1920 as the Federal *Water* Power Act (41 Stat. 1063). The Act's preamble specifies as among its purposes "the development of water power" (41 Stat. 1063). No mention is made of the development of steam power or of power generally.

We recognize that the title and preamble of a statute "cannot undo or limit that which the text makes plain" (*Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co.*, 331 U.S. 519, 529). But they are "tools available for the resolution of a doubt" and may "shed light on some ambiguous word or phrase" (*ibid.*). See, also, *Maguire* v. *Commissioner*, 313 U.S. 1, 9; *Federal Trade Commission* v. *Mandel Brothers, Inc.*, 359 U.S. 385, 388–389. Here the title and preamble furnish the context within which the scope of the Act's licensing provisions is to be understood.

As the court of appeals correctly observed (A. 73a–74a), other provisions of the Act's text reinforce the implications of the language of Section 4(e), the title of the Act, and the preamble. Section 4(a), 16 U.S.C. 797(a), authorizes the Commission to make investigations concerning "the *water-power* industry and its relation to other industries and to interstate or foreign commerce" (emphasis added). No mention is made of the steam power industry. Section 4(g), 16 U.S.C. 797(g), authorizes the Commission to investigate the proposed occupancy of public lands and waterways for the development of electric power and to issue appropriate orders "to conserve and utilize the navigation and *water-power* resources of the region" (emphasis added). No similar authority is con-

ferred in Part I of the Act with respect to the conservation of water resources for the development of steam power.

Section 10(a) of the Act, 16 U.S.C. 803(a), provides that a license under the Act may be issued only when the project "will be best adapted to a comprehensive plan for improving or developing a waterway or waterways * * *, for the improvement and utilization of *water-power* development, and for other beneficial public uses" (emphasis added). Section 24, 16 U.S.C. 818, provides that any federal lands included in a proposed project shall, upon the filing of an application, "be reserved from entry, location, or other disposal" until the Commission or Congress otherwise orders, but that "locations, entries, selections, or filings heretofore made for lands reserved as *water-power* sites, or in connection with *water-power* development, or electrical transmission may proceed to approval or patent" under conditions specified in the section (emphasis added).

These explicit references to water power reflect the limited scope of the Act's underlying purpose: to provide for the development of hydroelectric power generating facilities. If Congress had intended to confer on the Commission licensing jurisdiction over steam plants as well as hydroelectric plants, it did so in a most unusual fashion. Steam power was and is by far the major source of electrical energy (see A. 49a–50a, 58a, 73a). It is not likely that Congress would silently and obliquely bring the steam power industry within the Commission's licensing jurisdiction without so much as a reference to steam power in the Act or

its preamble. Nor is it likely that the Act would in those circumstances have been given a title that so plainly suggests an exclusive concern with hydroelectric power.

If these considerations do not themselves conclusively resolve the question concerning the reach of the Commission's licensing jurisdiction, they at least make the issue "sufficiently doubtful to warrant our resort to extrinsic aids to determine the intent of Congress, which, of course, is the controlling consideration" (*Cass* v. *United States*, No. 73–604, decided May 28, 1974, slip op. 5). As in *Cass*, "[s]uch aid is available in this case" and there is no reason "to ignore the clearly relevant history" of the statute (*id.* at 7).

*2. The legislative history of the Act supports the court of appeals' conclusion that Congress did not intend to give the Commission licensing jurisdiction with respect to thermal-electric power plants.*

The court of appeals determined (A. 72a): "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power." "Steam plants were purposely omitted from the congressional scheme" (A. 90a). We submit that the legislative history recounted in detail by the court fully supports its conclusion.

In the late 19th and early 20th centuries, federal efforts to manage the development and use of the nation's waterways were piecemeal and often haphazard

(A. 55a–59a).[12] It was "the escalating private appropriation of [hydroelectric power] sites that evoked the early federal regulatory initiatives" (A. 58a), such as the General Dam Act (34 Stat. 386), which was intended "to permit the development of water power while facilitating the improvement of stream navigability by the Government through the utilization of private capital" (A. 59a).

Experience proved, however, that the system of federal regulation of water power development was inadequate, and between 1914 and 1917 various bills attempting to correct the deficiencies were introduced in Congress.[13] The committee reports on several of these bills expressly refer to the development of hydroelectric power, while making no mention of regulating steam power.[14]

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[12] Legislation in that period included numerous Rivers and Harbors Acts aimed at preventing the obstruction of navigable waterways (see A. 55a–57a and n. 36); laws granting rights of way over public lands for purposes of irrigation or electric power generation (see A. 57a and nn. 37, 38); and bills routinely approved by Congress awarding hydroelectric power sites to private interests (A. 57a).

[13] Among the bills dealing with water power development on navigable waters were the Adamson Bill, H.R. 16053, 63d Cong., 2d Sess., and the Shields Bill, S. 3331, 64th Cong., 1st Sess. Bills addressed to the development of water power on the public lands included the Ferris Bill, H.R. 16673, 63d Cong., 2d Sess., and the Myers Bill, H.R. 16673, 63d Cong., 3d Sess., which was the Senate's response to the original wording of the Ferris Bill. See, also, H.R. 408, 64th Cong., 1st Sess.; S. 2399, 65th Cong., 1st Sess.

[14] See, *e.g.*, S. Rep. No. 89, 64th Cong., 1st Sess., pp. 2–4; H. Rep. No. 404, 64th Cong., 1st Sess., pp. 6–9; H. Rep. No. 842, 63d Cong., 2d Sess., pp. 1–4, 6; S. Rep. No. 898, 63d Cong., 3d Sess., Pt. 1, pp. 2–3; H. Rep. No. 16, 64th Cong., 1st Sess.,

In 1918, a bill prepared by the Secretaries of War, Interior, and Agriculture at the direction of President Wilson (H.R. 8716, 65th Cong., 2d Sess.) was sent to Congress. The bill contained most of the provisions eventually included in the Federal Water Power Act. In a letter to the chairman of the special House Committee on Water Power, which had held hearings on H.R. 8716, the Secretaries indicated that the bill was intended to apply only to hydroelectric projects. The letter (set forth at A. 66a–68a, n. 62) stated that, "[w]hile the form of bill which has been presented for your consideration *is directly concerned with water-power development only*, an adequate solution of this problem will have a favorable and stabilizing effect upon the whole power industry" (H. Rep. No. 715, 65th Cong., 2d Sess, p. 29; emphasis added).

Testimony before the committee was to the same effect. One witness specifically stated that the bill would not reach thermal-electric plants:[15]

> Mr. TAYLOR. You have spoken about the handicaps that are against water power development as compared with steam. The steam plants are not subjected—or will not be subjected, generally speaking—to the govern-

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pp. 2–5, 7, 9, 12–14; S. Rep. No. 66, 64th Cong., 1st Sess., Pt. 2, pp. 1–3, 13. See, also, H. Rep. No. 715, 65th Cong., 2d Sess., p. 15, in which the special House Committee on Water Power, referring to these earlier bils, stated that the "subject of water-power legislation with a view to the development of *hydro-electric* power has been a matter of very great public interest for a number of years" (emphasis added).

[15] Hearings, before the House Committee on Water Power, 65th Cong., 2d Sess., p. 179.

mental regulations that this bill provides for will they?

Mr. TOWNLEY. No, sir.

Mr. TAYLOR. And they will not be subjected either to the payment of Federal royalties?

Mr. TOWNLEY. No, sir.

That testimony went unchallenged throughout the hearings.

In its report, the committee stated that the theory of the bill was "to provide for the development of *hydroelectric* power by private capital" (H. Rep. No. 715, 65th Cong., 2d Sess., p. 15; emphasis added).[16] The report stated that "conditions growing out of the European war" had created actual or potential power shortages and had emphasized "[t]he necessity for the development of additional hydroelectric power" (*ibid.*).[17] In neither the floor debates[18] nor the conference report that followed[19] was there any intimation that the bill was meant to apply as well to thermal-electric generating facilities.

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[16] The report accompanied S. 1419. The committee proposed substituting the provisions of H.R. 8716 for those originally contained in S. 1419.

[17] The report of the Senate Commerce Committee to accompany the original version of S. 1419 also stated that the bill provided for "the development of hydroelectric energy produced by utilization of water power" (S. Rep. No. 179, 65th Cong., 2d Sess., p. 2).

[18] See the statement of Congressman French (56 Cong. Rec. 9314):

"We have here the question that has been considered for several years—the working out of the best way for the development and utilization of *hydroelectric* power of our country" (emphasis added).

[19] H. Conf. Rep. No. 1147, 65th Cong., 3d Sess.

The bill was not enacted by the 65th Congress, because a Senate filibuster at the close of the session prevented it from reaching a vote before adjournment (A. 69a, n. 62).[20] The bill was reintroduced in the following Congress, however, and was reported to the House without further hearings. The House Committee on Water Power recommended approval of the bill (H.R. 3184) to meet "the need for legislation for the development of *hydroelectric* power" (H. Rep. No. 61, 66th Cong., 1st Sess., p. 4; emphasis added).[21]

In remarks on the Senate floor, Senator Jones, one of the bill's principal proponents, gave a synopsis of the bill. He stated (59 Cong. Rec. 244; emphasis added):

> The bill creates a Federal *water-power* commission * * * to which is given authority over all matters over which the Federal Government has jurisdiction, pertaining to *the development of water powers* in navigable streams * * *.
>
> Under the bill, the commission is granted authority * * * *to issue licenses for water-power development* * * *.

There is no suggestion in the committee reports, the conference report, or elsewhere in the debates that the bill would authorize the Commission to issue licenses for *steam* power development.

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[20] See *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90, 102, n. 18.

[21] The House report was reprinted in the report of the Senate Committee on Commerce, which also recommended adoption of the bill in view of "the need for or the beneficent results to come from water power development" (S. Rep. No. 180, 66th Cong., 1st Sess., p. 2).

The bill passed both houses of Congress and was signed into law as the Federal Water Power Act on June 10, 1920.

In the next session of the same Congress, the Act was amended to eliminate from the Commission's jurisdiction the licensing of projects "within the limits as now constituted of any national park or national monument" (41 Stat. 1353). The amendment (S. 4554, 65th Cong., 3d Sess.) was introduced by Senator Jones (60 Cong. Rec. 28) to fulfill a commitment to President Wilson, who had been reluctant to sign the Federal Water Power Act if it would give the Commission control over hydroelectric development within the national parks and monuments (see *id.* at 403–404). The bill was reported orally to the Senate (*ibid.*), debated briefly (*id.* at 2001–2002, 3789, 4204), and passed by both houses.

Remarks on the floor of both houses reflect the assumption that the Federal Water Power Act was limited to the licensing of water power projects. Senator Walsh explained that the Water Power Act had been objected to by the Secretary of the Interior on the ground that it gave the Commission "authority to authorize the construction of dams for power purposes within the national parks" (*id.* at 2002). In the House, Congressman Esch echoed that remark (*id.* at 4204): "The Secretary of the Interior had great doubt as to the policy of giving to a commission control over national parks and monuments in the matter of water-power development."

By Title II of the Public Utility Act of 1935 (49 Stat. 838), the original Federal Water Power Act was

made Part I of the Federal Power Act. The amendments to the original Act, "all minor," were "requested by the Federal Power Commission, largely for the purpose of clarifying the Act in its application to situations that have arisen in its administration, and also to strengthen it in certain particulars" (H. Rep. No. 1318, 74th Cong., 1st Sess., p. 7).[22] Nothing in the legislative history of the Public Utility Act suggests that the Commission was to have licensing jurisdiction over thermal-electric generating facilities.

*3. The Commission has consistently interpreted the Act to confer licensing jurisdiction only over hydroelectric facilities, and that interpretation is entitled to great weight.*

In its First Annual Report to Congress, the newly created Federal Power Commission interpreted its own licensing jurisdiction as extending only to hydroelectric projects. The report stated (1921 Annual Report, pp. 51–52; emphasis added):

> On neither the public lands and reservations nor on the waters of the United States is the jurisdiction of the Federal Power Commission as broad as the jurisdiction of Congress. The latter has authority over all forms of use; *the Commission is limited to the consideration of projects designed to produce water power.* Structures or diversions having any other purpose, unless incidental to works constructed for

[22] See, also, S. Rep. No. 621, 74th Cong., 1st Sess., Pt. 1, p. 43:

"In section 4(d), here relettered (e), the provisions authorizing the Commission to issue licenses are brought together in one general grant of power. * * * The provisions for the issuance of licenses on public lands and for the utilization of surplus power of Government dams are left unchanged."

> power purposes or a necessary part of a comprehensive scheme of development, are not within the jurisdiction of the Commission.

The report also contained an opinion of the Commission's chief counsel, approved by the Commission, concluding that it has no jurisdiction to approve a right of way over public lands for a transmission line that would transmit electricity generated by a steam plant, because the Commission's jurisdiction is limited to structures related to hydroelectric power generation (*id.* at 155–156).[20]

Subsequent Annual Reports reiterated the Commission's consistent view that its licensing authority extends only to non-federal hydroelectric projects on lands or waters subject to federal jurisdiction.[21] The

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[20] The chief counsel's opinion stated (pp. 155–156):

"[A] transmission line having no connection with a water-power project does not come within the purview of the Federal Water Power Act * * *.

* * * * *

"I think it is fairly to be inferred from the context, as well as the circumstances surrounding the enactment of the legislation, that it was the purpose of Congress to confer exclusive jurisdiction on the Federal Power Commission, except as provided therein, over the matter of issuing licenses for power projects, or parts thereof, for the development of hydroelectric power, and that it was not intended to vest the Commission with jurisdiction over the public lands for other purposes. If this view be correct, it follows that where a proposed transmission line is in no way connected with a water-power project the Commission is without jurisdiction to license the same."

[21] See the Commission's Annual Reports for the following years: 1935, p. 1; 1939, p. 2; 1940, pp. 1–5; 1946, pp. 2–3; 1949, p. 3; 1950, p. 3; 1951, p. 2; 1956, pp. 3, 5; 1957, pp. 3, 4; 1958, p. 4; 1959, p. 4; 1960, p. 5; 1961, p. 7; 1962, pp. 8, 12–13; 1963, p. 7; 1964, pp. 10–11, 13; 1965, p. 10; 1966, pp. 8–9, 13; 1967, p. 25; 1968, p. 29; 1969, p. 25; 1970, p. 31; 1971, p. 22.

Commission's 1962 Annual Report, for example, described a new legislative recommendation to amend the Federal Power Act. The proposed amendment was designed to extend the Commission's existing authority by giving it licensing jurisdiction over "new facilities to be erected in or abutting the navigable waters of the United States for the diversion of water for use in a steam-electric generating plant" (pp. 12–13). "At present," the report stated, "the Commission's licensing jurisdiction under Part I of the Federal Power Act is limited to projects for the generation of hydroelectric power" (p. 13).[25]

The proposed amendment, which was not adopted by Congress, remained a part of the Commission's legislative program for several years. Subsequent Annual Reports repeated the recommendation made in 1962 and reiterated that the Commission's existing authority does not extend to the regulation of steam

[25] The report explained why the Commission believed that a limited extension of its jurisdiction would be appropriate (p. 13):

"[I]ncreasingly in recent years plants for steam-electric generation have been built adjacent to navigable waters of the United States with diversion facilities in, across or along the stream to provide water for cooling purposes. Under existing law such projects have required special authorizing legislation by the Congress. It is believed that the determinations of the relationship of such projects to the comprehensive development of navigable waters of the United States can efficiently and promptly be made by this agency, which has performed this function with respect to hydroelectric projects since 1920, while relieving Congress of an increasingly burdensome task. In recognition of the more limited control which need be exercised over facilities located on navigable waters in connection with steam-electric plants, the amendment spells out the limits of Commission authority."

power facilities. 1964 Annual Report, pp. 10–11; 1966 Annual Report, pp. 8–9.

The Commission's view of its licensing authority was expressed in its formal decisions as well. In 1965, the Commission, acting pursuant to Section 10(b) of the Act, 16 U.S.C. 803(b),[28] authorized the licensee of a licensed hydroelectric project to grant an easement on project land to another company for the purpose of constructing and operating steam-electric generating facilities. *Brazos River Authority,* 34 FPC 1507. It also authorized the licensee to "permit the use of its reservoir and other project works as a source of and return for cooling water for [the] steam-electric generating facilities" (*id.* at 1509).

These actions, however, were not an assertion of jurisdiction over the steam-electric project over its use of the water. Rather, they were solely an exercise of the Commission's authority over the disposition of water and land of the licensed hydroelectric project. The Commission was explicit on this point. It stated (*id.* at 1508–1509):

> Licensee has not expressly requested the Commission to authorize the construction and operation of the Companies' steam-electric generating plants, but, lest our action herein be interpreted as authorizing such construction or operation, we wish to make clear * * * that the Commission is not empowered to license

[28] Section 10(b) provides that "no substantial alteration or addition not in conformity with the approved plans shall be made to any dam or other project works [of a specified capacity] constructed hereunder * * * without the prior approval of the Commission * * *."

steam-electric generating facilities and that we have not undertaken to do so herein.

As the court of appeals correctly recognized (A. 76a), this consistent administrative construction of the Act since its enactment, regularly made known to Congress in the Commission's Annual Reports, "is entitled to great weight" (*Trafficante* v. *Metropolitan Life Insurance Co.*, 409 U.S. 205, 210). "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration" (*Udall* v. *Tallman*, 380 U.S. 1, 16). "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new'" (*Power Reactor Development Co.* v. *International Union of Electrical Workers*, 367 U.S. 396, 408).

As the court of appeals also correctly stated, "[i]t is not without significance * * * that this administrative interpretation was transmitted directly to Congress the year after passage of the Act, and that the only two significant amendments to the Act over the following fourteen years, including a reenactment of the Act in 1935, gave no hint of congressional desire to override the Commission's construction of the scope of its jurisdiction" (A. 76a). See *United States* v. *Wyoming*, 331 U.S. 440, 452–453. "By reenacting unchanged the material provisions of the Act with knowledge of the contemporaneous construction

placed upon the Act by those charged with its administration, Congress can be said to have indicated its satisfaction with that construction" (A. 77a). See *Cammarano* v. *United States*, 358 U.S. 498, 510–511.

*4. This Court has clearly expressed its understanding that the Commission's licensing authority extends only to hydroelectric projects.*

The question presented by these cases—whether the Commission has licensing jurisdiction with respect to steam-electric generating facilities—is not one of first impression for this Court. In *Federal Power Commission* v. *Union Electric Co.*, 381 U.S. 90—where the Court held that a license was required under Part I of the Federal Power Act to construct a pumped-storage hydroelectric plant that would generate electricity for interstate transmission—all nine Justices agreed that the Act's licensing provisions are inapplicable to steam plants.

The question arose in this way. The Commission asserted licensing jurisdiction over the pumped-storage hydroelectric plant, to be located on a non-navigable tributary of a navigable stream, on the ground that it would generate electricity for interstate transmission and would thereby affect "the interests of interstate or foreign commerce" within the meaning of Section 23(b) of the Act, 16 U.S.C. 817. That Section provides that a "dam or other project works" proposed to be located on a non-navigable stream subject to federal jurisdiction may not be constructed or operated without a license if the Commission finds that "the interests of interstate or foreign

commerce would be affected by such proposed construction * * *."

The respondent argued that "commerce" under Section 23(b) means *water* commerce and that a license is therefore required only if the project would affect the interests of navigation or water commerce on the downstream navigable waterway. To rest licensing jurisdiction over the pumped-storage project solely on the interstate transmission of energy, respondent argued, would be inconsistent with the Commission's "view that steam plants generating large amounts of energy for interstate transmission are not within the scope of § 23(b), although located along a stream over which Congress has jurisdiction" (381 U.S. at 109). Since, in respondent's view, "there can be no basis for distinguishing between a steam plant and a hydroelectric facility both generating energy for interstate use" (*id.* at 109–110), the Commission's failure to assert jurisdiction over steam plants suggests that Congress intended in Section 23(b) to invoke only its power over navigable waters and not its full authority over interstate commerce generally.

The Court held, however, that the purpose of the Federal Water Power Act was not merely to improve navigability so as to enhance water commerce. "The principal use to be developed and regulated in the Act, as its title indicates, was that of hydroelectric power to meet the needs of an expanding economy" (*id.* at 99).[27]

[27] This purpose, the Court stated, is reflected not only in the Act's title, but also in its provisions, including the preamble ("to provide for the * * * development of water power"), Sec-

Thus, while "[t]he Act unquestionably involved an invocation of the congressional power over navigation under the Commerce Clause" (*id.* at 102), Congress also intended to invoke "its full Commerce Clause authority over hydroelectric projects located on waters subject to federal jurisdiction" (*id.* at 105).

The Court therefore concluded that, "[i]f the comprehensive development of water power, 'in so far as it was within the reach of the federal power to do so,' * * * was the central thrust of the Act, there is obviously little merit to the argument that § 23(b) requires a license when the interests of water commerce are affected but dispenses with the license when other commerce interests are vitally involved" (*id.* at 101).

The Court also specifically rejected, in light of the Act's "central concern," the claim that "there can be no basis for distinguishing between a steam plant and a hydroelectric facility both generating energy for interstate use" (*id.* at 109–110). It held that the Act's purpose was to provide for the development of *hydroelectric* energy, not to regulate the generation of *steam-electric* energy, and that this basic limitation of the Commission's licensing authority explains the different treatment of the two types of projects. The Court stated (*id.* at 110):

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tion 10(a) (proposed project must "be best adapted to a comprehensive plan * * * for the improvement and utilization of water-power development"), and "[o]ther provisions regulat[ing] the operations, services, charges, and duration of hydroelectric plants, 'provisions * * * not essential to or even concerned with navigation as such,' but which 'have an obvious relationship to the exercise of the commerce power'" (381 U.S. at 100–101).

> On [respondent's] reasoning either the Act should, but does not, require a license for a steam plant when situated on the navigable mainstream itself, or should not, but does require a license for a hydroelectric plant, pumped storage or otherwise, situated on the mainstream but which has no demonstrable effect, or a beneficial effect, on navigability.
>
> The answer to this conundrum is that unlike Part II of Title II of the Public Utility Act of 1935, under which the Commission regulates various aspects of the sale and transmission of energy in interstate commerce, Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission.

The three dissenting Justices, speaking through Mr. Justice Goldberg, would have interpreted "commerce" to mean water commerce. They agreed with the respondent that the Court's ruling "produces a substantial anomaly, for steam generating plants that affect interstate commerce in a manner identical to that of hydroelectric plants such as the one involved here would not be required to obtain a license from the Commission, yet hydroelectric plants would have to obtain one" (*id.* at 114).

Though the dissenting Justices thus rejected the majority's explanation of the difference between pumped-storage and steam projects, they would have

held that *both* types of plants are outside the scope of the Commission's licensing authority. Mr. Justice Goldberg stated: "The legislative history here * * * establishes to my satisfaction that it has required licenses of neither steam plants nor the type of hydroelectric plant here involved" (*id.* at 115).[28]

[28] The Court's earlier decisions also reflect an understanding that the Commission has no licensing authority with respect to thermal-electric plants. In *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission*, 328 U.S. 152, the Court held that an applicant for a license to construct and operate a hydroelectric facility need not first obtain a state permit for the facility. The Court reasoned that the Act divides responsibilities with respect to power development between the Federal Power Commission and the states and gives to the Commission full authority to grant "appropriate licenses for the development of *water power* resources in the navigable waters of the United States" (*id.* at 172, n. 17; emphasis added). "The [Federal Water Power] Act was distinctly an effort to provide federal control over and give federal encouragement to *water power development*" (*id.* at 180, n. 28; emphasis added).

In *United States ex rel. Chapman* v. *Federal Power Commission*, 345 U.S. 153, the Court held that a comprehensive plan approved by Congress for the development of the water resources of the Roanoke River Basin was not intended to withdraw from the Commission its jurisdiction to license the construction and operation of a hydroelectric generating facility by a private power company at a site within the comprehensive plan. Reviewing "the role of the Commission in hydroelectric power development" (*id.* at 167), the Court stated that "the significant development has been the devising of a general power policy instead of *ad hoc* action by Congress (*ibid.*). The original Federal Power Commission, composed of three cabinet officers, was "[a]n agency so burdened with other duties [that it] was naturally found inadequate as the instrument of *these important water-power policies*" (*id.* at 168; emphasis added). The reconstituted Commission is "the permanent disinterested expert agency of Congress to carry out these policies" (*ibid.*).

We do not say that the decision in *Union Electric* forecloses further consideration of the issue presented here, since the narrow holding in that case was only that pumped-storage hydroelectric projects located on navigable federal waterways and generating electricity for interstate transmission must be licensed by the Commission. We do submit, however, that the reasoning of both the majority opinion and the dissenting opinion in *Union Electric* rests in part on the considered premise that Part I of the Federal Power Act confers on the Commission no licensing jurisdiction with respect to thermal-electric generating plants. That unanimously endorsed interpretation of the Act—with which Congress has apparently been content and which we have shown to be supported by the Act's language, history, and purpose and by 53 years of consistent administrative interpretation—warrants at least substantial weight in deciding the present case.

*5. Technological changes since the Act was passed do not bring steam plants within the Commission's licensing jurisdiction.*

The claimants argued in the court of appeals that technological advances have led to a "dramatic change in the [thermal-electric power] industry" (C.A. Br. 44), resulting in the construction of steam plants that have a much greater capacity and need for cooling waters than those in use in 1920. This change, they argued, "requires a corresponding modification in regulatory practices" consistent with the Commission's "flexible mandate from Congress * * * to institute comprehensive planning for the nation's waterways and to regulate the interstate electric power industry" (*id.* at 44–45).

The contention was correctly rejected by the court of appeals for the reasons given in its opinion. "[T]he FPC does not have a broad, abstract mandate either to regulate the electric power industry or to engage in comprehensive planning for the utilization of our major waterways. * * * The Federal Water Power Act of 1920 was intended to promote the comprehensive development of the Nation's water resources in the context of regulating hydroelectric power" (A. 88a–89a). Since "most of the electric power produced in this country at the time the Act was passed was generated by water-cooled steam plants * * * any legislation intended to regulate comprehensively the interrelationship between the production of power and the efficient management of water resources would surely have taken account of the existence of these water-using steam plants" (A. 90a).

There is thus no reason to "conclude that recognizing Commission jurisdiction over steam plants is essential to fulfillment of the agency's congressional mandate" (*ibid.*). "Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness" (*ibid.*). To adopt the claimants' position "would accomplish by judicial fiat what Congress has refused or neglected to accomplish when it enacted and later amended the Federal Water Power Act" (A. 97a).

The situation here is thus quite different from that in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, in which this Court held that the Federal Communications Commission has authority to regulate

CATV systems. The Court there reasoned that, while the provisions of the Communications Act do not expressly apply to CATV, "Congress could not in 1934 have foreseen the development" of such systems (*id.* at 172). Congress recognized, however, that the communications industry was a dynamic one, and it therefore deliberately "conferred upon the Commission a 'unified jurisdiction' and 'broad authority'" to execute "'a comprehensive mandate'" (*id.* at 172–173).

Moreover, the Court held that the Act's provisions—which apply to "all interstate and foreign communication by wire" (47 U.S.C. 152(a))—are broad enough to include CATV; that "[n]othing in the language of § 152(a), in the surrounding language, or in the Act's history or purposes limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions" (392 U.S. at 172); and that "[t]he Commission has reasonably found that the successful performance of [its] duties demands prompt and efficacious regulation of community antenna television systems" (*id.* at 177).

None of these conditions is present here. Congress *was* aware in 1920 and in 1935 that thermal-electric plants were the primary source of the Nation's electric energy. It did *not* give the Federal Power Commission a "comprehensive mandate" to regulate all aspects of the power industry. The Federal Power Act's language, history, and purposes *do* limit the Commission's authority to the licensing of hydroelectric projects. And the Commission has *not* deter-

mined that the successful performance of its regulatory duties with respect to hydroelectric projects requires the regulation of steam-electric plants.[29]

*6. The contention that policy reasons support an extension of the Commission's jurisdiction to steam plants should be addressed to Congress, not the courts.*

The claimants argued in the court of appeals that "there are important policy reasons favoring [the Commission's] jurisdiction" to license steam-electric power projects (C.A. Br. 12). They stated that "power plant siting problems have created a national energy crisis" (*ibid.*) and that "the Federal Power Commission is the logical agency to regulate power plant siting" (*id.* at 17), because the Commission "has had long experience in dealing with the problems of adequate power supply and the environmental effects of electric power production" (*id.* at 20).

We do not here undertake to dispute the claimants' "policy reasons," because we believe that they are beside the point. It may be, as the court of appeals stated, that, "[i]n this age of pervasive federal regulation and of heightened awareness of environmental considerations, it is difficult to comprehend that there

[29] Nor is this case like *American Trucking Associations* v. *United States*, 344 U.S. 298, in which the Interstate Commerce Commission promulgated rules to eliminate practices in the trucking industry that were not specifically prohibited by the statute but that endangered the enforcement of "practically the entire regulatory scheme" (*id.* at 312). The extension of the Commission's jurisdiction sought by the claimants in the present case would not eliminate new evils in the hydroelectric power industry but would bring under regulation a distinct industry to which the Act was not meant to apply.

should be no federal agency or policy governing the siting and operation of fossil-fueled steam plants" (A. 92a–93a). And perhaps the Federal Power Commission *is* "the logical agency to design and implement a national siting policy" (A. 95a). Indeed, the Commission has supported legislation to that effect (see A. 95a–96a).

But the issue in this case is not what the Nation's policy should be with respect to power plant siting. It is simply whether the existing provisions of the Federal Power Act give the Commission licensing jurisdiction with respect to steam-electric power facilities. As we have shown, the answer to that question is that Commission has no such authority. Moreover, "Congress * * * has not yet decided to provide explicitly for federal regulation of power plant siting" (A. 97a); even less has it determined what the policy will be or what agency will administer it.

If there are sound reasons of policy to amend the existing statute to give the Commission licensing authority over steam-electric facilities, those reasons should be addressed to Congress, not the courts. It is the legislative branch of government, not the judicial, that is equipped to assess the advantages and disadvantages of a proposed extension of the Commission's jurisdiction and to take full account of the practical consequences of such a change.

To extend the Commission's jurisdiction in the manner sought by the claimants would raise a variety of questions that would require a peculiarly legislative response. For example, the licensing of nuclear-powered thermal-electric generating plants is pres-

ently committed to the jurisdiction of the Atomic Energy Commission, which administers a comprehensive scheme of regulation. Should the Power Commission be given overlapping authority with respect to nuclear plants, or should it be limited to conventional fossil-fueled plants? Should the Commission's licensing authority comprehend all aspects of a steam plant's facilities, or should it relate only to the diversion facilities used to draw cooling waters from a waterway subject to federal jurisdiction? Should the licensing requirement be prospective only, or should it apply to existing facilities and those under construction?

Should the federal government preempt all regulatory authority over steam plants, or should the states retain a role in the regulatory scheme? Should the entire federal regulatory authority, including the authority to dispose of waters subject to federal jurisdiction, be concentrated in a single agency, or should it be divided among the existing agencies and departments that have special expertise in one or more areas? Should the licensing agency be charged with developing a comprehensive plan for the development and conservation of water resources? Should it develop a comprehensive scheme for regulating the entire electric power industry?

What licensing standards should the agency apply? What environmental considerations should it take into account? What role should it play in determinations of plant siting? Should steam plant licensees, like licensees of hydroelectric plants (16 U.S.C. 814), be given the power of eminent domain in certain cir-

cumstances? In this time of critical energy shortage, what measures should be included to minimize unnecessary delay in the licensing process?

These questions are not answered by the existing statute, because the Federal Water Power Act was not designed to apply to the steam-electric industry. A judicial expansion of the Commission's authority in these circumstances would leave the agency without an adequate statutory framework to support a new regulatory undertaking. Congress alone has the institutional capacity to gather the necessary information, to weigh all the complex policy considerations, to accommodate the important conflicting interests, and to fashion a statutory scheme that will adequately guide the agency charged with its administration. Several pending bills dealing with the siting of power plants may provide Congress with an opportunity to perform that function in this area.[50]

C. THE SURPLUS WATER CLAUSE IS NOT AN EXCEPTION TO THE ACT'S LIMITATIONS; IT REQUIRES A LICENSE ONLY FOR THE USE OF SURPLUS WATER FROM A GOVERNMENT DAM IN CONNECTION WITH THE DEVELOPMENT OF HYDROELECTRIC ENERGY

*1. The history and purpose of the Act show that the surplus water clause, like the rest of the Act's provisions, applies only to the development of hydroelectric energy.*

On the basis of its own compelling analysis of the Federal Power Act's history and purposes, the court of appeals correctly concluded that "the structures comprising thermal-electric plants are not 'project' works' required to be licensed by the FPC under § 4(e)" (A. 55a). That analysis did not focus on the

[50] See, *e.g.*, H.R. 180, H.R. 2374, H.R. 3591, H.R. 4874, H.R. 5278, H.R. 13204, H.R. 13484, and S. 935, 93d Cong.

"project works" clause alone or even on Section 4(e). The legislative, administrative, and judicial authority on which it was grounded relates to the proper interpretation of the Act as a whole.

When the court turned to a consideration of the "surplus water" clause of the same section, however, it inexplicably ignored the overwhelming case it had already made concerning the Act's limited scope and purpose. The court thus stated, in our view incorrectly, that "there apparently is no useful legislative history" bearing on the meaning of the "surplus water" clause (A. 101a), and it erroneously concluded, on the basis of "[w]hat little extrinsic assistance we have been able to piece together" (*ibid.*), that "the Commission does have jurisdiction to license the utilization of surplus water by thermal-electric generating plants" (A. 112a).

There is, contrary to the court's assumption, a wealth of legislative history on the surplus water clause, and that history is fully consistent with the Act's limited purpose of developing *hydroelectric* power but not regulating steam power. We have already shown that the title, preamble, and text of the Act relate exclusively to water power, that its overall legislative history belies any intention on the part of Congress to regulate the use of water by steam-electric generating plants, that the Commission has always viewed its licensing juridiction as limited to hydroelectric facilities, and that this Court's deci-

sions clearly reflect the same understanding of the Commission's jurisdiction.[31]

In these circumstances, we submit, only a strong and unambiguous showing of legislative intent could support claimants' contention and the court of appeals' conclusion that the surplus water clause, as an isolated exception to the rest of the Act's provisions, authorizes the Commission to license the use of such water not only for the development of hydroelectric energy but also for cooling purposes in thermal-electric plants. Neither the court nor the claimants, however, have made any such showing. On the contrary, the legislative history indicates that the surplus water clause, like the rest of the Act, relates exclusively to the development of hydroelectric energy.

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[31] The scope of the Commission's licensing authority under Section 4(e) is illuminated, moreover, by the language of Section 23(b), 16 U.S.C. 817, which states the circumstances in which a person is *required* to obtain a license (see note 10, *supra*). Section 23(b) provides that "[i]t shall be unlawful for any person, State, or municipality, *for the purpose of developing electric power*, to * * * utilize the surplus water or water power from any Government dam" (emphasis added) except in accordance with a license issued by the Commission. Only a hydroelectric facility can fairly be said to use "surplus water or water power" "for the purpose of developing electric power." It is true that steam plants use cooling water to condense the steam which turns the turbines and that those waters may "increase the efficiency of the generating process" (A. 91a, n. 128). But only in hydroelectric generation is the water itself the power source. We submit, therefore, that the reference in Section 23(b) to using water "for the purpose of developing electric power" means harnessing the power of falling water to produce electric energy.

The phrase "surplus water" has its roots in federal legislation enacted between 1888 and 1909, which conferred on the Secretary of War authority to lease surplus water at specific federal dams for the development of water power at the dam site (Supp. 2s–10s).[32] Congress first began considering comprehensive water resource development in 1914. In that year, a bill was introduced in the House (H.R. 16053, 63d Cong., 2d Sess.) to amend the General Dam Act.

Section 14 of the bill, the antecedent of the present Section 4(e)'s surplus water clause, authorized the Secretary of War to lease "the right *to develop power from the surplus water* over and above that required for navigation at any navigation dam now or hereafter constructed * * * and owned by the United States" (emphasis added). The report of the House Committee on Interstate and Foreign Commerce described Section 14 as "a new section authorizing the Secretary of War to lease * * * any *surplus power developed by a dam* that is constructed or owned by the United States for the purposes of navigation" (H. Rep. No. 592, 63d Cong., 2d Sess., p. 6).

Remarks on the floor of the House confirm that Section 14 was concerned solely with the use of surplus water to generate hydroelectric energy. Congressman Mann stated that at many of the federal dams "there is surplus water which may be used for the

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[32] "Supp." refers to the supplement to the brief of Arizona Public Service Company, *et al.* The supplement contains an extensive legislative history of the surplus water clause, which shows that the clause relates only to the development of hydroelectric power.

development of water power" and that Section 14 authorizes "the Secretary of War to lease that surplus water power and make charges for it" (51 Cong. Rec. 11403). Similarly, Congressman Brown, in extended remarks, stated that Section 14 "permits the Secretary of War and the Chief of Engineers to lease the right to develop power from the surplus water flowing over any dam" (51 Cong. Rec. App. 768). Steam power was alluded to only as a competing source of electric energy that would influence the cost of hydroelectric energy but that would not itself be suitable for regulation (see 51 Cong. Rec. 12336 (Congressman Underwood), 12593 (Congressman Bryan), 12769 (Congressman Lenroot), 12777 (Congressman Rainey)).

Section 14 was amended on the floor of the House to give a preference to municipalities over private corporations in the procurement of leases and to limit the term of a lease to 50 years (see *id.* at 13256–13260). The amendment also changed the surplus water language of the Section in a way that resembles the present language of Section 4(e). The amended Section 14 authorized "leases for the use of *surplus water and water power* generated at dams and works constructed wholly or in part by the United States in the interest of navigation" (*id.* at 13256; emphasis added).

The change from "surplus water" to "surplus water and water power" was not explained. Since prior bills and committee reports had freely interchanged the terms "surplus water," "surplus power," and "surplus water power," the phrase "surplus water and water power" may have been chosen to avoid any sug-

gestion that one or another of those concepts was intentionally excluded and to reflect the fact that water in excess of that needed for government purposes may be viewed in terms either of volume (gallons or acre-feet) or in terms of power potential (energy generating capacity).[35]

It is clear, in any event, that the change was not intended to reach the use of water for purposes other than hydroelectric generation. As Congressman Stevens, author of the amendment, explained, "the only substantial change * * * is that no lease of water-power rights to anyone shall be for a longer period than 50 years"; "no lease of water-power rights * * * should be given in perpetuity to any corporation, private or public" (*id.* at 13257). If the phrase "surplus water and water power" had been designed to bring the steam power industry within the Commission's licensing jurisdiction, that surely would have been a "substantial change" worthy of mention by the author of the amendment.

The bill as amended was passed by the House (*id.* at 13276) and sent to the Senate. The Senate Commerce Committee reported out a substitute bill (S.

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[35] In *California Oregon Power Co.*, 15 FPC 14, petition for review dismissed *sub nom. California Oregon Power Co.* v. *Federal Power Commission*, 239 F. 2d 426 (C.A. D.C.), the Commission drew another distinction. It held that a hydroelectric plant located downstream from a government dam uses "surplus water" from the dam within the meaning of Section 4(e) if its operation depends upon water released from the dam. It stated that "water power" from the dam, by contrast, "is the result of the head and flow there available," and its use "is limited by natural laws to those developments at or in the vicinity" of the dam (15 FPC at 20).

6413, 63d Cong., 2d Sess.) containing another version of a surplus water clause.[34] Like the House bill, however, the Senate bill was directed only to "[t]he question of water-power development by the construction of dams across navigable streams and the improvement of navigation in connection with water-power development" (S. Rep. No. 846, 63d Cong., 3d Sess., p. 1). No action was taken on the Senate bill in the 63d Congress.

Similar bills were introduced in the 64th and 65th Congresses, and the legislative history of those bills shows that Congress continued to view the surplus water clause as limited to the development of water power (see Supp. 29s–51s). The phrase "surplus water and water power" reappeared in the 64th Congress as a House substitute for Section 19 of S. 3331. The House Committee on Interstate and Foreign Commerce reported that "Section 19 regulates the method to be pursued by the War Department in *leasing the power* at [federal] dams" and that it "continues the method existing as to Government dams for many years, under which the War Department has satisfactorily regulated and leased surplus water at a number of such structures" (H. Rep. No. 404, 64th Cong., 1st Sess., p. 11; emphasis added). There was nothing in the report or the floor debates to suggest that the licensing authority would extend to the use of water by steam plants (see Supp. 33s–35s).

The 65th Congress considered the bill proposed by

[34] Section 10 of the bill authorized the Secretary of War to lease "the right to utilize the surplus water over and above that required for navigation at any [federal] navigation dam * * *."

President Wilson (H.R. 8716, 65th Cong., 2d Sess.), which, as amended by the 65th and 66th Congresses, ultimately became the Federal Water Power Act. The proposed bill was submitted to the House as a substitute for S. 1419 (see p. 22, *supra*) and was referred to the special House Committee on Water Power, which held extensive hearings. As introduced in the committee, Section 4(d) of the bill, in language that closely parallels the present language of Section 4(e) of the Federal Power Act, authorized the Commission (which was to be composed of the Secretaries of War, Interior, and Agriculture) to issue licenses for the purpose of constructing and operating dams and other "project works" and "for the purpose of utilizing the *surplus water or water power* over and above that required for navigation at any navigation dam now or hereafter constructed * * * and owned by the United States" (H. Rep. No. 715, 65th Cong., 2d Sess., p. 23; emphasis added). There is no indication that the substitution of "or" for "and" in the phrase "surplus water or water power" was intended to change the substance of the clause as contained in prior bills.

As reported out of the committee, the clause in Section 4(d) read "for the purpose of utilizing the surplus water or water power from any navigation dam" (*id.* at 3).[35] The changes and deletions were not

[35] The phrase "navigation dam" was defined in Section 3 as "a dam or other work, constructed or owned by the United States for the improvement of navigation * * * from which flows surplus water not needed for navigation that may be disposed of under the provisions of this Act" (H. Rep. No. 715, 65th Cong., 2d Sess., p. 2).

meant to expand the Commission's licensing jurisdiction over the use of water beyond its use for hydroelectric generation (Supp. 39s–44s). During the hearings, Department of Agriculture engineer O. C. Merrill, the principal draftsman of the bill, testified that the bill was not designed to regulate the use of water for purposes of irrigation. "The only thing this bill is doing is to grant a license for that particular power development occupying the public lands. There is no assumption of any control whatever over any other uses the licensee may make of that water outside of that development" (Hearings before the House Committee on Water Power, 65th Cong., 2d Sess., pp. 89–90). Similarly, Congressman Taylor stated that "this bill is for the purpose, as I understand it, of giving authority to create power and *utilize water for power purposes*" (*id.* at 92; emphasis added).

Although the Senate never acted on the conference report on S. 1419,[36] the bill, as amended, was introduced again in the 66th Congress, was passed by both houses, and was signed into law on June 10, 1920.[37] The congressional debate shows that the legis-

[36] The conferees substituted the phrase "Government dam" for "navigation dam" in Section 4(d) as "a more comprehensive and clearer expression of what is intended" (H. Conf. Rep. No. 1147, 65th Cong., 3d Sess., p. 15). The definition of "Government dam" in Section 3 was accordingly expanded to include dams constructed or owned by the United States "for Government purposes * * * from which flows surplus water not needed for Government purposes that may be disposed of under the provisions of this Act" (*id.* at 2).

[37] In the 66th Congress, the words "from which flows surplus water not needed for Government purposes that may be dis-

lators viewed the bill as regulating only the development of water power, and there is nothing to suggest that the surplus water provision was intended to be an exception (see Supp. 51s–87s). The surplus water clause as enacted thus embodied the same meaning that it had in its earlier form in the 63d Congress, when Section 14 of H.R. 16053 had authorized the Secretary of War to license "the right to develop power from the surplus water over and above that required for navigation at any navigation dam * * *." Although the clause as enacted applies to any government dam and not merely navigation dams, its purpose continues to be to regulate the development of power from surplus water not needed for government purposes.

*2. The Act does not assign to the Federal Power Commission the broad responsibilities that prior legislation had given to the Waterways Commission, and those responsibilities did not, in any event include licensing the use of surplus water by steam plants.*

In concluding that the Federal Water Power Act was intended to authorize the Commission to license the use of surplus water by thermal-electric generating plants, the court of appeals relied upon the Act's repealing of a 1917 river and harbors appropriation Act, which had created a Waterways Commission with broad responsibilities to coordinate water use planning (A. 107a). The court reasoned that "the newly created Federal Power Commission took over

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posed of under this Act" were deleted from the definition of "Government dam" as "not necessary to the definition" (H. Rep. No. 910, 66th Cong., 2d Sess., p. 7). The deletion did not change the meaning.

the planning and coordination responsibilities of the Waterways Commission, which included consideration of a spectrum of water uses not related to water power" (*ibid.*; footnote omitted). It therefore concluded that the Federal Water Power Act "reflects * * * a concern with comprehensive water resource management" (A. 109a) and that the surplus water clause gives the Commission authority to license "a spectrum of water uses not related to water power" (A. 107a), including the use of water for cooling purposes by steam plants.

The court's premises are incorrect. The Waterways Commission's responsibilities were investigatory, not regulatory, and even those responsibilities were not inherited by the Power Commission. The Waterways Commission was created by Section 18 of the Rivers and Harbors Act of 1917, 40 Stat. 269. It was given authority to coordinate the efforts of all government departments and agencies "in investigating, with respect to all watersheds in the United States," a wide variety of questions concerning water resource development and conservation.[35] The Commission was directed "to secure the necessary data, and to formulate and report to Congress * * * a comprehensive plan or plans for the development of waterways and the water resources of the United States for the purposes of navigation and for every useful purpose * * *."

[35] The Act specified as topics for investigation "navigation * * *, irrigation, drainage, forestry, arid and swamp land reclamation, clarification of streams, regulation of flow, control of floods, utilization of water power, prevention of soil erosion and waste, storage, and conservation of water for agricultural, industrial, municipal, and domestic uses * * *."

The Act gave the Waterways Commission no licensing jurisdiction and no regulatory authority.

Section 29 of the Federal Water Power Act, which repealed "all Acts or parts of Acts inconsistent with this Act," also expressly repealed Section 18 of the 1917 Act creating the Waterways Commission. The court of appeals thought that the "newly created Federal Power Commission took over the planning and coordination responsibilities of the Waterways Commission" (A. 107a). But the history of Section 29 shows that Congress did not intend to transfer the Waterways Commission's functions to the new Power Commission.

Repeal of the statute creating the Waterways Commission was first proposed and approved on the House floor during consideration of Section 29. The purpose was to avoid the possibility of conflict between the two commissions in areas of common responsibility and to eliminate a commission whose functions had never been exercised because President Wilson had never appointed its members (58 Cong. Rec. 2250–2251).

In the Senate, the Commerce Committee agreed that the Waterways Commission should be eliminated (S. Rep. No. 180, 66th Cong., 1st Sess., p. 20), but an amendment was adopted on the Senate floor to continue the existence of the Waterways Commission with certain changes not important here (59 Cong. Rec. 1535). Supporters of the amendment thought the Waterways Commission should be continued because its authority "is very much more comprehensive and covers infinitely more ground than the Water Power Commission created in the pending act" (remarks of

Senator Ransdell, *id.* at 1176; see, also, remarks of Senator Ashurst, *id.* at 1174–1175).

The Senate amendment was omitted in conference, and the final bill therefore repealed the authority of the Waterways Commission (H. Rep. No. 910, 66th Cong., 2d Sess., pp. 13–14). One of the House conferees explained why the Senate amendment had been omitted (59 Cong. Rec. 6525):

> The President never appointed the [Waterways] commission, notwithstanding the act was passed as far back as 1917. Moreover, many of the powers that were given to the commission we have given to various bodies created in the transportation act of 1920, especially with reference to inland water transportation. Other powers granted in the [1917] Act are contained in this water-power bill. So there was very little left for this commission to do.

There is thus no foundation for the court of appeals' conclusion that the functions of the Waterways Commission with respect to uses of water for other than the development of hydroelectric energy were inherited by the new Power Commission. The contrary is true. What the Act did not expressly give to the Power Commission, and what had not previously been transferred to other agencies, was eliminated.

*3. That Congress has explicitly conferred on other officers and agencies the authority to permit the use of water within their jurisdiction for purposes other than hydroelectric generation does not mean that Congress intended to give the Power Commission similar authority.*

The court of appeals thought that its interpretation of the surplus water clause was strengthened by legislation enacted prior and subsequent to the Federal

Water Power Act that authorized other agencies and departments to enter into contracts permitting the use of water within their jurisdiction for purposes other than the development of hydroelectric power (A. 169a–112a). For example, the Reclamation Act of 1920, 43 U.S.C. 521, enacted about three months prior to the Federal Water Power Act, authorized the Secretary of the Interior, "in connection with the operations under the reclamation law * * * to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper * * *."

Similarly, the Secretary of the Interior is authorized under the Boulder Canyon Project Act "to contract for the storage of water in [the Hoover Dam] reservoir and for the delivery thereof * * * for irrigation and domestic uses" (43 U.S.C. 617d). The Secretary of the Army likewise "is authorized to make contracts * * * for domestic and industrial uses for surplus water that may be available at any reservoir under the control of the Department of the Army" (33 U.S.C. 708).

From this and similar legislation, the court of appeals inferred that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency" (A. 111a–112a). We do not disagree with that inference. We do dispute, however, the correctness of the court's further conclusion that "the 'surplus water' provision of the Federal Power Act [is] but an early manifestation

of that concern" and that "Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced" (A. 112a).

If the legislation giving other officers explicit authority to dispose of surplus water for purposes other than hydroelectric power development has any bearing at all on the proper interpretation of Section 4(e) of the Federal Power Act, it demonstrates only that when Congress has intended to confer that broad contractual authority it has known how to do so unambiguously. In light of the history of the surplus water clause in Section 4(e), there is no foundation for the court's assumption that Congress meant to give the Commission *licensing* authority, equivalent to the Secretary of the Interior's *contractual* authority, over non-hydro-power uses of surplus water. The scheme and purpose of the Act, the contemporaneous administrative construction, and this Court's decisions all support the Commission's determination that its jurisdiction extends only to use of surplus water for the generation of hydroelectric energy.

*4. The Commission's jurisdiction to license the use of surplus water is not duplicative of its jurisdiction to license the construction, operation, and maintenance of project works.*

Complainants argued in the court of appeals that, if the surplus water clause were applicable only to the use of such water for hydroelectric generation, "that clause would be rendered nugatory and meaningless," because "[a]ll hydroelectric developments on naviga-

ble streams and other streams over which Congress has authority under its interstate and foreign commerce power are already subject to regulation under the 'constructing, operating, and maintaining' clause of Section 4(e), whether or not they use surplus water from government dams" (C.A. Reply Br. 14–15).

Even if complainants' view of the Commission's jurisdiction under the project works clause were correct, it would not follow that the surplus water clause "would be rendered nugatory" by the Commission's interpretation of it. A license to construct, operate, and maintain project works does not necessarily carry with it the authority to use surplus water from a government dam. Where a project will use such water, it may require a license under both clauses. See *California Oregon Power Co.*, 13 FPC 1, 3, and 15 FPC 14, 18–21 (supplemental opinion), petition for review dismissed, 239 F. 2d 426 (C.A.D.C.); *Alabama Power Co.*, 34 FPC 1108.[39]

Moreover, complainants' extravagant view of the Commission's jurisdiction is incorrect. If it were true, as complainants assert, that "[a]ll hydroelectric developments on navigable streams and other streams over which Congress has jurisdiction under its interstate and foreign commerce power are already subject to regulation under the 'construcing, operating, and maintaining' clause of Section 4(e), whether or not

[39] Congress could also give an agency alternative, albeit coextensive, bases of jurisdiction, so that the agency could proceed on the strength of one where the existence of the other is unclear. Neither jurisdictional base would be "meaningless," even though each comprehends no more than the other.

they use surplus water from government dams" (C. A. Reply Br. 14–15), then there would have been no need for this Court to decide *Federal Power Commission* v. *Union Electric Co., supra.*

The pumped-storage project in that case was a hydroelectric facility located on a stream over which Congress has jurisdiction under its interstate and foreign commerce power. On complainants' theory, that alone would have been enough to bring the project within the Commission's licensing jurisdiction. But, as this Court's opinion makes clear, a license would *not* have been required for the project if the electricity was to have been transmitted solely in intrastate commerce.

What the complainants overlook is that the provisions of Section 4(e) conferring licensing authority on the Commission must be read together with the provisions of Section 23(b) specifying the situations in which a license is required.[40] While Section 4(e) might appear to authorize the issuance of a license to any hydroelectric plant on a waterway within federal jurisdiction—*i.e.*, "for the development * * * of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States"—Section 23 (b) specifies the circumstances in which a license for such a project is required. Thus Section 23(b) requires a license for hydroelectric developments on navigable

[40] Section 23(b) is set forth in the Appendix to this brief, *infra*, pp. 63–64.

streams. If a project is on a *non*-navigable stream, a license is required only if the stream is within the jurisdiction of Congress and the project's construction would affect the interests of interstate or foreign commerce (the situation in *Union Electric*). A license is also required if the project is on public land or reservations, or if the project would "utilize the surplus water or water power from any Government dam * * *."

Thus, when Section 4(e) is read in connection with Section 23(b), it becomes apparent that the surplus water clause does have independent application and could alone provide the basis for a license. A hydroelectric facility located on a non-navigable waterway, on private land, generating electricity solely for intrastate transmission, and in no other way affecting the interests of interstate or foreign commerce, would require a license if, but only if, it were using surplus water from a federal dam.

Although the Commission has not frequently found it necessary to rest its licensing jurisdiction solely on the surplus water clause, it has done so on occasion. *Green Mountain Power Corp.*, 13 FPC 1211; *Utah Power & Light Co.*, 31 FPC 958, vacated, 31 FPC 1537. What matters, in any event, is not whether a pure surplus water case has actually arisen, but that, as we have shown, such cases can arise under the Commission's interpretation of the Act. Contrary to the claimants' contention, therefore, the Commission's interpretation does not render the surplus water clause superfluous.

## CONCLUSION

The judgment of the court of appeals should be affirmed insofar as it upholds the Federal Power Commission's determination that it lacks licensing jurisdiction under the project works clause of Section 4 (e), and reversed insofar as it sets aside the Commission's order on the basis of the surplus water clause; and the case should be remanded to that court with directions to enter a judgment of affirmance.

Respectfully submitted.

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AUGUST 1974.

## APPENDIX

1. Section 3 of the Federal Power Act, 41 Stat. 1063, as amended, 16 U.S.C. 796, provides in part:

> The words defined in this section shall have the following meanings for purposes of this Act, to wit:
>
> * * * * *
>
> (10) "Government dam" means a dam or other work constructed or owned by the United States for Government purposes with or without contribution from others;
>
> (11) "project" means complete unit of improvement or development, consisting of a power house, all water conduits, all dams and appurtenant works and structures (including navigation structures) which are a part of said unit, and all storage, diverting, or forebay reservoirs directly connected therewith, the primary line or lines transmitting power therefrom to the point of junction with the distribution system or with the interconnected primary transmission system, all miscellaneous structures used and useful in connection with said unit or any part thereof, and all water-rights, rights-of-way, ditches, dams, reservoirs, lands, or interest in lands the use and occupancy of which are necessary or appropriate in the maintenance and operation of such unit;
>
> (12) "project works" means the physical structures of a project * * *.

2. Section 4 of the Federal Power Act, 41 Stat. 1065, as amended, 16 U.S.C. 797, provides in part:

> The Commission is authorized and empowered—
>
> * * * * *

(e) * * * To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Govenment dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the commission that the license will not interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided further*, That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the

commission and shall become a part of the records of the commission: *Provided further*, That in case the commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further*, That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the proviso of said subsection.

* * * * *

3. Section 23(b) of the Federal Power Act, 41 Stat. 1075, as amended, 16 U.S.C. 817, provides:

It shall be unlawful for any person, State, or municipality, for the purpose of developing electric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such con-

struction file declaration of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws.

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-[illegible]

FEDERAL POWER COMMISSION, *Petitioner,*

v.

CHEMEHUEVI TRIBE OF INDIANS, *et al., Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

## BRIEF AMICUS CURIAE IN BEHALF OF EDISON ELECTRIC INSTITUTE


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# Supreme Court of the United States

OCTOBER TERM, 1973

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## BRIEF AMICUS CURIAE IN BEHALF OF EDISON ELECTRIC INSTITUTE

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In accordance with this Court's Rule 42, Edison Electric Institute has received the consent of counsel for all other parties to file this brief *amicus curiae.*

### INTEREST OF AMICUS CURIAE

Edison Electric Institute ("EEI") is the principal national association of electric utility companies, having as its members 193 operating companies which supply electricity to 77 percent of all the electric service customers in the United States. This brief is sub-

mitted in support of the Petition for a Writ of Certiorari being filed by the Solicitor General for the Federal Power Commission. EEI also supports a similar petition being filed by Arizona Public Service Co., *et al.*, intervenors in the court below.

The decision below[1] would impose Federal Power Commission ("FPC") licensing jurisdiction on the use of cooling water by thermal-electric generating plants, if the water is found by the FPC to be "surplus water" drawn from either of two sources: a reservoir behind a dam operated by an agency of the Federal Government, or any portion of a river located downstream from a Government dam.[2] A substantial number of the estimated 876 thermal power plants planned for construction and operation between 1970-1990 will draw cooling water from these two sources.[3]

Approximately 700 major dams are currently operated by federal agencies.[4] The decision below has set

---

[1] Chemehuevi Tribe of Indians v. FPC, 489 F.2d 1207 (D.C. Cir. 1974). The decision is reprinted with Federal Reporter pagination in the Appendix to the Petition for Certiorari filed by Arizona Public Service Co., *et al.*

[2] A modern 1000 megawatt fossil-fueled plant with a "once-through" cooling system requires a water flow through the condenser of about 1500 cubic feet per second. FPC, 1970 National Power Survey, pt. I, at I-1-25 (1971).

[3] *Id.* at I-1-17, Table 1.2. During the period 1970-1990, it will be necessary to almost quadruple the industry's present generating capacity to meet projected demand.

[4] Included in this category are TVA-operated hydroelectric facilities, flood control and multiple-purpose dams operated by the U.S. Army Corps of Engineers, and storage dams operated by the Department of the Interior Bureau of Reclamation. Approximately 500 additional dams are operated by the Corps of Engineers and the Bureau of Reclamation for navigational and water diversion purposes.

the stage for a series of jurisdictional confrontations between those agencies and the FPC. A formal license application to the FPC would be required to determine two issues: whether "surplus water" would be utilized for a proposed power plant and, if so, whether it should be used for cooling purposes or committed to competing uses. Resolution of those issues will inevitably require substantial delays in the approval of construction sites for new electric generating plants. Individual utilities will be faced with one more uncertainty in the planning process, not accompanied by offsetting regulatory benefits.

Edison Electric Institute believes that the decision below would impose a totally unnecessary federal regulatory scheme upon the present federal-state regulation of power plant siting and operations. More important, the resulting interagency conflict would impair the ability of the electric utility industry to continue to provide the nation with an adequate supply of electric energy.

## REASONS FOR GRANTING A WRIT OF CERTIORARI

Edison Electric Institute believes that a writ of certiorari should be granted because the lower court's construction of the "surplus water" clause and the resulting extension of FPC jurisdiction cannot be reconciled either with this Court's analysis of the Commission's jurisdiction in *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965), or with the lower court's own analysis of the legislative history and purposes of the Federal Water Power Act.

Since the first year of its existence, the Federal Power Commission has consistently held that it lacks jurisdiction to license steam-electric generating plants.

The decision by the Court of Appeals reverses that 53-year-old rule with respect to plants using "surplus water." It ignores a pattern of legislation going back to 1906 expressly granting jurisdiction over the disposition of "surplus water" to other Government departments and agencies.

## I.

### THE DECISION BELOW FAILS TO REFLECT THE LIMITATION OF FPC JURISDICTION DETERMINED BY THIS COURT IN TAUM SAUK.

In construing the "surplus water" clause of Section 4(e) of the Federal Power Act,[5] the court below has extended FPC jurisdiction far beyond the concerns that prompted Congress to enact the original Federal Water Power Act in 1920. The decision of the Court of Appeals is inconsistent with this Court's finding in the *Taum Sauk* case, *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965), that an "obvious distinction" removes steam-electric generating plants from the regulatory scheme contemplated by Congress in 1920.

In *Taum Sauk*, it was held that Section 23(b) of the Federal Power Act[6] requires an FPC license for construction of a pumped-storage hydroelectric project utilizing the waters of a non-navigable river subject to federal jurisdiction to generate electricity for interstate transmission. The argument was made there that if FPC licensing jurisdiction is based on the interstate transmission of energy, there can be no basis for distinguishing between a steam-electric plant and a hydroelectric facility, if each generates electricity for interstate transmission and uses water subject to fed-

[5] 16 U.S.C. § 797(e) (1970).

[6] 16 U.S.C. § 817 (1970).

eral jurisdiction. This Court rejected that argument, finding that the two types of generating plant are distinguishable on the basis of the "central concern" of the Act:

> ". . . Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." 381 U.S. at 110.

This distinction provides the barrier preventing a jurisdictional leap to all steam-electric plants generating electricity for interstate transmission and using cooling water over which Congress has jurisdiction. It does not result from any intricate construction of the language of Section 23(b). Rather, it is found in the "central concern" of the original Federal Water Power Act.

In construing the "surplus water" clause of Section 4(e), the court below expressly found that no such distinction exists. After observing that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power," 489 F.2d at 1242, the court concluded:

> "At a minimum Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced." *Id.*

Support for that conclusion was not derived from the legislative history of the Federal Water Power Act. Indeed, the court found that "there is little in the way

of extrinsic illumination of the congressional purpose in enacting the 'surplus water' clause . . . and there apparently is no useful legislative history." 489 F.2d at 1236-7.

The decision refers instead to pre-1920 Supreme Court cases and acts of Congress relating to the federal leasing and sale of surplus water power. The lower court's historical analysis includes only one explicit reference to congressional interest in control of water uses unrelated to water power. In 1917 Congress created a Waterways Commission which was empowered to coordinate and plan virtually all aspects of water resources development.[7] Noting that the Federal Water Power Act explicitly repealed the act creating the Waterways Commission, the Court of Appeals assumed that all of the broad duties granted to the Waterways Commission were simply relocated in the FPC. That assumption is inconsistent with the purposes of the Federal Water Power Act described by this Court in *Taum Sauk,* and it is also contradicted by the lower court's own exhaustive account of the Federal Water Power Act's legislative history contained in the portion of the decision construing the "project works" clause of Section 4(e). The Act of 1917 provides no valid historical basis for assuming that Congress, in enacting the Federal Water Power Act, was concerned with the use of surplus water unrelated to its use for hydroelectric power.

The Court of Appeals relied extensively on the legislative history of the Federal Water Power Act in finding that the FPC lacks jurisdiction under the "project works" clause. However, the lower court abruptly

[7] Act of August 8, 1917, ch. 49, 40 Stat. 250.

abandoned its analysis of the legislative history when it turned to the "surplus water" clause in the same section of the Act. The result was a literal construction of the clause which is plainly erroneous when juxtaposed with the court's own earlier descriptions of the legislative history:

> "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power.
>
> * * *
>
> "Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness." 489 F.2d at 1222-3, 1231.[8]

---

[8] The court's conclusions are well supported by excerpts from the legislative history cited in the decision.

> "The industrial expansion . . . has placed unprecedented demands upon the electric power industry, to such an extent in fact that the output of commercial central stations has increased more than 60 percent since 1914. This increase . . . has been chiefly in the form of steam-generated power, because steam power can be developed more quickly and at less capital cost than water power. . . .
>
> "*While the form of bill which has been presented for your consideration is directly concerned with water-power development only*, an adequate solution of this problem will have a favorable and stabilizing effect upon the whole power industry."

Letter dated Feb. 27, 1918 from Secretaries of War, Interior, and Agriculture transmitting H. R. 8716, 65th Cong., 2d Sess. (1918). (Emphasis added.)

> "The power requirements of this country will not be met until we develop our water powers, tie them in with steam plants at the mine itself and operate all in great interstate systems."

Report from Secretary Houston to the House, H. R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919).

Having made these observations, the court below proceeded to ignore them in construing the "surplus water" clause, insisting that no useful legislative history exists to explain the congressional purpose in enacting that clause. The apparent requirement for excerpts from the legislative history pertaining directly to the "surplus water" provision defies explanation. Such a requirement was not imposed by either the majority or the dissenting Justices in *Taum Sauk* when they construed the "interests of commerce" provision of Section 23(b).

The Court of Appeals, in applying relevant legislative history to only one of the two clauses construed in the decision below, has injected into its decision a massive inconsistency involving important questions of FPC jurisdiction. The result is also inconsistent with the statutory interpretation adopted by this Court in *Taum Sauk*.

## II.

## THE DECISION BELOW MISREADS THE EFFECT OF FEDERAL LEGISLATION AUTHORIZING OTHER AGENCIES TO DISPOSE OF "SURPLUS WATER".

In its analysis of the background of the Federal Water Power Act, the court below noted earlier legislation, particularly the 1906 amendments to the Reclamation Act,[9] empowering the Secretary of Interior or the Secretary of War to dispose of surplus water from a Government dam. 489 F.2d at 1238-9. The Court of Appeals also noted a series of post-1920 statutes containing similar grants of authority. 489 F.2d at 1241. From that pattern of legislation, the lower court erected the

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[9] Act of April 16, 1906, ch. 1631, § 5, 34 Stat. 117, *as amended*, 43 U.S.C. § 522 (1970).

premise that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency." 489 F.2d at 1242. From that premise, the Court of Appeals proceeded to the conclusion that Congress intended the FPC to exercise that control.

The contrary conclusion more readily squares with the statutory pattern. Congress has repeatedly designated other agencies to lease or sell surplus water. For what purpose would it confer upon the FPC a redundant power to authorize the same uses? More sensible is the construction that Congress intended a division of authority, with the appropriate Secretary empowered to dispose of the surplus water, and the FPC chartered to license the construction of any "project works" to make use of that water. In that reading, of course, the "project works" required to be licensed would be limited under *Taum Sauk* to hydroelectric projects. If no hydroelectric "project works" were required to use the surplus water, there would be no need to seek an FPC license.

A second incongruity is raised by the lower court's conclusion that "Congress surely intended to give the FPC control over the use of surplus water for the generation of power, no matter by what mechanical force the electricity is ultimately produced." 489 F.2d at 1242. If so, why did Congress repeatedly after 1920 pass legislation conferring that power upon other agencies? We think those subsequent laws make plain that Congress had no idea in 1920 that it was giving plenary authority to the Federal Power Commission to license the use of "surplus water." The absence of any such

intent is borne out by the lack of separate legislative history for the "surplus water" clause.

## CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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No. 73-1667

IN THE

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**On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit**

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## BRIEF OF AMICUS CURIAE EDISON ELECTRIC INSTITUTE

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Edison Electric Institute ("EEI") is the principal national association of electric utility companies, having as its members 190 operating companies which

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EEI believes that the decision below would produce an unworkable and totally unnecessary federal regulatory scheme, which could not be coordinated with the present federal-state regulation of power plant siting and operations. The resulting interagency conflict would create another obstacle impairing the ability of the electric utility industry to continue to provide the nation with an adequate supply of electric energy.

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[1] Chemehuevi Tribe of Indians v. FPC, 489 F.2d 1207 (D.C. Cir. 1973).

[2] A modern 1000 megawatt fossil-fueled plant with a "once-through" cooling system requires a water flow through the condenser of about 1500 cubic feet per second. FPC, 1970 National Power Survey, pt. I, at I-1-25 (1971).

[3] *Id.* at I-1-17, Table 1.2. During the period 1970-1990, it will be necessary virtually to quadruple the industry's present generating capacity to meet projected demand.

Approximately 700 major dams are currently operated by federal agencies.[4] Jurisdictional confrontations between those agencies and the FPC are assured if the decision below is permitted to stand. A formal license application to the FPC would be required to determine two issues: whether "surplus water" would be available for a proposed power plant and, if so, whether it should be used for cooling purposes or committed to competing uses. Resolution of those issues would inevitably require substantial delays in the approval of construction sites for new electric generating plants. Individual utilities would be faced with one more uncertainty in the planning process, not accompanied by offsetting regulatory benefits.

EEI submits that protracted jurisdictional disputes between the FPC and other agencies could not be avoided if the FPC is required to implement the lower court's mandate. By imposing on the Commission a new licensing function, the court has also created a new regulatory process with built-in conflicts.[5] For example, in determining the availability of "surplus water" either at a Government dam or at a down-

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[4] Included in this category are TVA-operated hydroelectric facilities, flood control and multiple-purpose dams operated by the U.S. Army Corps of Engineers, and storage dams operated by the Department of the Interior Bureau of Reclamation. Approximately 500 additional dams are operated by the Corps of Engineers and the Bureau of Reclamation for navigational and water diversion purposes.

[5] The lower court stated:

> "[I]t is apparent that *in every case* involving a contention of the applicability of the 'surplus water' clause, the FPC will have to consider the interrelationship of its enabling act and the scope of the authority of the Government agency responsible for the particular Government dam." 489 F.2d at 1241 (emphasis supplied).

stream location, the FPC would be required initially to decide whether it would be bound by the "surplus water" determination of another federal agency either operating the dam or controlling the consumptive use of the water. The issue would be decided without benefit of a statutory or judicial definition of "surplus water." If the FPC asserts jurisdiction to decide the issue in a particular case and finds "surplus water" to be available, the determination either to grant a license for use as cooling water, or to deny the license on the ground that the water should be committed to other uses, would require an FPC incursion into the jurisdiction and expertise of other federal agencies, particularly the Department of the Interior and the Environmental Protection Agency. Interagency conflict would be the certain result.

Such jurisdictional disputes, EEI believes, would inevitably create further delays in power plant siting decisions and construction schedules at a time when many electric utilities have recently been forced to postpone or cancel planned construction for financial reasons. These actions have raised serious questions about the adequacy and reliability of future electricity supplies.[6]

The question before the lower court was raised with reference to the Colorado River System; however, the

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[6] The current plight of the electric utilities and its effect on electricity supplies are matters of growing national concern. The Senate Interior Committee has announced an investigation of the growing financial problems of the electric utilities. The investigation will include, among other things, an examination of the factors causing reductions in utility construction programs, and a study of the consequences of a substantial decline in reserve generating capacity and system reliability. 120 CONG. REC. S13875 (daily ed. July 31, 1974).

court's holding applies to all rivers in the United States.[7] If this Court should limit its decision to holding that the FPC lacks jurisdiction over the six named electric plants, then the broader jurisdictional question would remain unresolved, and the decision below would continue to apply to Government dams on all rivers other than the Colorado. For this reason, and for the reasons stated in the arguments below, EEI urges this Court to hold explicitly that Section 4(e) of the Federal Power Act[8] does not impose FPC licensing jurisdiction on the use of "surplus water" by thermal-electric generating plants.

## SUMMARY OF ARGUMENT

EEI believes that the decision below imposes on the FPC licensing jurisdiction not authorized by the Federal Power Act. The lower court's construction of the "surplus water" clause and the resulting extension of FPC jurisdiction cannot be reconciled either with this Court's analysis of the Commission's jurisdiction in *FPC* v. *Union Electric Co.*, 381 U.S. 90 (1965), or with the lower court's own analysis of the legislative history and purposes of the original Federal Water Power Act.[9]

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[7] Accordingly, in May 1974 a complaint was filed with the FPC citing the decision below and requesting that the FPC exercise jurisdiction over the use of "surplus water" by a proposed thermal-electric generating plant in Oklahoma. Otoe-Missouria Tribe of Indians v. Oklahoma Gas & Electric Co., FPC Dkt. No. E-8833 (filed May 31, 1974). The Indian complainants were represented by the attorneys for the complainants herein. There is no reason to doubt that additional complaints will be filed relating to power plants in other areas of the nation.

[8] 16 U.S.C. § 797(e) (1970).

[9] Act of June 10, 1920, ch. 285, 41 Stat. 1063.

Since the first year of its existence, the Federal Power Commission has consistently held that it lacks jurisdiction to license steam-electric generating plants. The decision by the Court of Appeals reverses that 54-year-old rule with respect to plants using "surplus water." It ignores a pattern of legislation going back to 1906 expressly granting jurisdiction over the disposition of "surplus water" to other Government departments and agencies.

The legislative history of the Federal Water Power Act reveals the error in the lower court's construction of the "surplus water" clause. It also confirms that the Court of Appeals properly interpreted the "project works" clause of Section 4(e). The court correctly held that the term "project works" does not include thermal-electric generating plants and that the FPC therefore does not have licensing jurisdiction over such plants.

## I.

## THE LEGISLATIVE HISTORY OF THE "SURPLUS WATER" CLAUSE DEMONSTRATES THAT THE LOWER COURT'S LITERAL INTERPRETATION OF THE CLAUSE IS ERRONEOUS.

The legislative history of the Federal Water Power Act extends back six years from the date of its enactment and is rich with statements demonstrating that the words "surplus water" in Section 4(e) of the Act were intended to refer to water not needed for navigation to be used for the production of hydroelectric power at Government navigation dams.[10] The legislative history clearly reveals that Congress had no inten-

[10] A detailed description of the legislative history of the "surplus water" clause is set forth in the briefs filed by the Solicitor General and Arizona Public Service Co., *et al.*

tion to regulate the use of "surplus water" in thermal-electric generating plants. The decision below does not discuss this portion of the legislative history. Indeed, the lower court erroneously concluded that "there apparently is no useful legislative history" of the clause. 489 F.2d at 1236. The fact is, however, that the congressional intent has been plainly expressed, and therefore, this Court has a duty to give effect to that intent. *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 215 (1962).

The "long and colorful" legislative history of the Federal Water Power Act discloses "a vigorous determination of Congress to make progress with the development of the long idle water power resources of the Nation . . . ." *First Iowa Hydro-Elec. Coop.* v. *FPC*, 328 U.S. 152, 171 (1946). The primary goal of the Act was the development of water power which would serve as a substitute for the power from steam-electric generating plants, thereby reducing demand for the limited supplies of fossil fuels. *FPC* v. *Union Elec. Co.*, 381 U.S. 90, 99 (1965). This primary purpose of the Act is simply not compatible with the notion that Congress was also concerned with creating a licensing requirement relating to the operation of steam-electric generating plants. In the absence of an unmistakable directive, the "surplus water" clause should not be construed in a manner which runs counter to the broad goals which Congress intended to accomplish in enacting the Federal Water Power Act. *See FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968).

The court below concluded that "the language of the 'surplus water' clause does indeed mean what it says." 489 F.2d at 1237. That literal reading of the statutory language should not be allowed to stand.

When the literal interpretation of statutory language produces an unreasonable result "plainly at variance with the policy of the legislation as a whole," this Court has followed the congressional purpose, rather than the literal words. *United States* v. *American Trucking Ass'ns,* 310 U.S. 534, 543 (1940); *see Tidewater Oil Co.* v. *United States,* 409 U.S. 151, 157 (1972).

## II.

## THE DECISION BELOW FAILS TO REFLECT THE LIMITATION OF FPC JURISDICTION DETERMINED BY THIS COURT IN TAUM SAUK.

In construing the "surplus water" clause of Section 4(e) of the Federal Power Act,[11] the court below has extended FPC jurisdiction far beyond the concerns that prompted Congress to enact the original Federal Water Power Act in 1920. The decision of the Court of Appeals is inconsistent with this Court's finding in the *Taum Sauk* case, *FPC* v. *Union Electric Co.,* 381 U.S. 90 (1965), that an "obvious distinction" removes steam-electric generating plants from the regulatory scheme contemplated by Congress in 1920.

In *Taum Sauk,* it was held that Section 23(b) of the Federal Power Act[12] requires an FPC license for construction of a pumped-storage hydroelectric project utilizing the waters of a non-navigable river subject to federal jurisdiction to generate electricity for interstate transmission. The argument was made there that if FPC licensing jurisdiction is based on the interstate transmission of energy, there can be no basis for distinguishing between a steam-electric plant and a

[11] 16 U.S.C. § 797(e) (1970).

[12] 16 U.S.C. § 817 (1970).

hydroelectric facility, if each generates electricity for interstate transmission and uses water subject to federal jurisdiction. This Court rejected that argument, finding that the two types of generating plant are distinguishable on the basis of the "central concern" of the Act:

> ". . . Part I, the original Federal Water Power Act, is concerned with the utilization of water resources and particularly the power potential in water. In relation to this central concern of the Act, the distinction between a hydroelectric project and a steam plant is obvious, and meaningful, although both produce energy for interstate transmission." 381 U.S. at 110.

This distinction provides the barrier preventing a jurisdictional leap to all steam-electric plants generating electricity for interstate transmission and using cooling water over which Congress has jurisdiction. It does not result from any intricate construction of the language of Section 23(b). Rather, it is found in the "central concern" of the original Federal Water Power Act.

In construing the "surplus water" clause of Section 4(e), the court below expressly found that no such distinction exists. After observing that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power," 489 F.2d at 1242, the court concluded:

> "At a minimum, Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced." *Id.*

Support for that conclusion was not derived from the legislative history of the Federal Water Power Act.

Indeed, as noted above, the court below concluded that "there apparently is no useful legislative history." 489 F.2d at 1236. Moreover, the lower court also found that "there is little in the way of extrinsic illumination of the congressional purpose in enacting the 'surplus water' clause." *Id.*

The decision below refers to pre-1920 Supreme Court cases and acts of Congress relating to the federal leasing and sale of surplus water power. The lower court's historical analysis includes only one explicit reference to congressional interest in control of water uses unrelated to water power. In 1917 Congress created a Waterways Commission which was empowered to coordinate and plan virtually all aspects of water resources development.[13] Noting that the Federal Water Power Act explicitly repealed the act creating the Waterways Commission, the Court of Appeals assumed that all of the broad duties granted to the Waterways Commission were simply relocated in the FPC. That assumption is inconsistent with the purposes of the Federal Water Power Act described by this Court in *Taum Sauk,* and it is also contradicted by the lower court's own exhaustive account of the Federal Water Power Act's legislative history contained in the portion of the decision construing the "project works" clause of Section 4(e). The Act of 1917 provides no valid historical basis for assuming that Congress, in enacting the Federal Water Power Act, was concerned with the use of surplus water unrelated to its use for hydroelectric power.

The Court of Appeals relied extensively on the legislative history of the Federal Water Power Act in finding that the FPC lacks jurisdiction under the "project

[13] Act of August 8, 1917, ch. 49, 40 Stat. 250.

works" clause. However, the lower court abruptly abandoned its analysis of the legislative history when it turned to the "surplus water" clause in the same section of the Act. The result was a literal construction of the clause which is plainly erroneous when juxtaposed with the court's own earlier descriptions of the legislative history:

> "The history of the Act shows beyond any doubt that the only segment of the power industry that was intended to be regulated by the Act was the construction and operation of facilities for the generation of hydroelectric power.
>
> * * *
>
> "Steam plants were purposely omitted from the congressional scheme, and we cannot rewrite the statute to correct what may have been legislative shortsightedness." 489 F.2d at 1222-23, 1231.[14]

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[14] The court's conclusions are well supported by excerpts from the legislative history cited in the decision.

> "The industrial expansion . . . has placed unprecedented demands upon the electric power industry, to such an extent in fact that the output of commercial central stations has increased more than 60 percent since 1914. This increase . . . has been chiefly in the form of steam-generated power, because steam power can be developed more quickly and at less capital cost than water power. . . .
>
> "*While the form of bill which has been presented for your consideration is directly concerned with water-power development only*, an adequate solution of this problem will have a favorable and stabilizing effect upon the whole power industry."

Letter dated Feb. 27, 1918 from Secretaries of War, Interior, and Agriculture transmitting H.R. 8716, 65th Cong., 2d Sess. (1918) (emphasis supplied).

> "The power requirements of this country will not be met until we develop our water powers, tie them in with steam plants located at the mine itself and operate all in great interstate systems."

Report from Secretary Houston to the House, H.R. Rep. No. 61, 66th Cong., 1st Sess. 5 (1919).

Having made these observations, the court below proceeded to ignore them in construing the "surplus water" clause, insisting that no useful legislative history exists to explain the congressional purpose in enacting that clause.

The Court of Appeals, in applying relevant legislative history to only one of the two clauses construed in the decision below, has injected into its decision a massive inconsistency. The error is compounded by the lower court's failure to consider the substantial legislative history addressed specifically to the "surplus water" clause.

## III.

## THE DECISION BELOW MISREADS THE EFFECT OF FEDERAL LEGISLATION AUTHORIZING OTHER AGENCIES TO DISPOSE OF "SURPLUS WATER".

In its analysis of the background of the Federal Water Power Act, the court below noted earlier legislation, particularly the 1906 amendment to the Reclamation Act,[15] empowering the Secretary of the Interior to dispose of surplus water from a Government reclamation dam. 489 F.2d at 1238-39. The Court of Appeals also noted a series of post-1920 statutes containing similar grants of authority. 489 F.2d at 1241. From that pattern of legislation, the lower court erected the premise that "Congress has for a long time been concerned with the controlled disposition of surplus federal water and power, and has often expressed this concern by granting plenary control over such disposition to a federal agency." 489 F.2d at 1242. From that premise, the Court of Appeals proceeded to the conclu-

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[15] Act of April 16, 1906, ch. 1631, § 5, 34 Stat. 117, *as amended*, 43 U.S.C. § 522 (1970).

sion that Congress intended the FPC to exercise that control.

The contrary conclusion more readily squares with the statutory pattern. Congress has repeatedly designated other agencies to lease or sell surplus water. For what purpose would it confer upon the FPC a redundant power to authorize the same uses? More sensible is the construction that Congress intended a division of authority, with the appropriate Secretary empowered to dispose of the surplus water, and the FPC chartered to license the construction of any "project works" to make use of that water. In that reading, of course, the "project works" required to be licensed would be limited under *Taum Sauk* to hydroelectric projects. Therefore, if there is no hydroelectric project, there would be no need to seek an FPC license.

A second incongruity is raised by the lower court's conclusion that "Congress surely intended to give the FPC control over the use of surplus waters for the generation of power, no matter by what mechanical force the electricity is ultimately produced." 489 F.2d at 1242. If so, why did Congress repeatedly after 1920 pass legislation conferring that power upon other agencies? We think that the enactment of those subsequent laws provides further evidence of the fact that Congress had no intention in 1920 to grant plenary authority to the Federal Power Commission to license the use of "surplus water."

## CONCLUSION

For the foregoing reasons, this Court should reverse that portion of the decision below imposing FPC licensing jurisdiction over the use of "surplus water" by thermal-electric generating plants.

Respectfully submitted,

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